AMERICAN LAW AND PROCEDURE

VOLUMES I TO XII PREPARED UNDER THE EDITORIAL SUPERVISION OF

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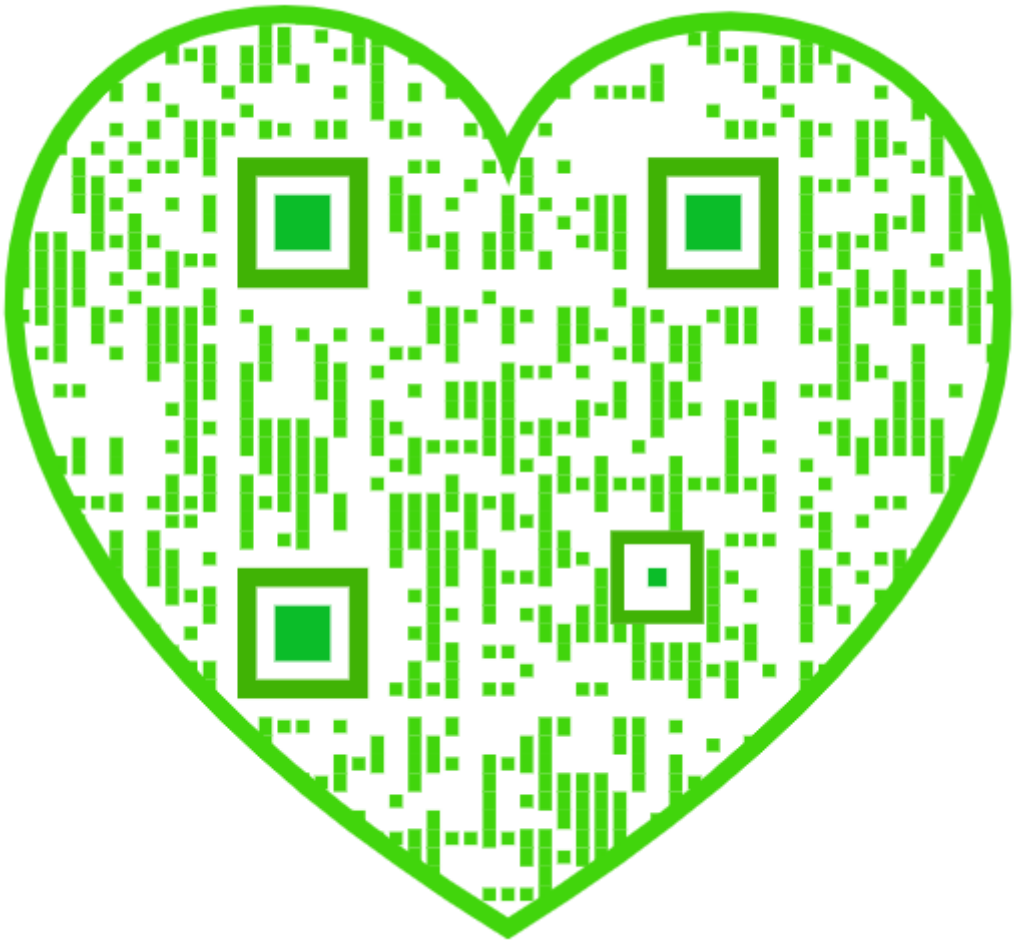

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AMERICAN LAW AND PROCEDURE

VOLUME II.

PREPARED UNDER THE EDITORIAL SUPERVISION OF

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TORTS

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DOMESTIC RELATIONS AND PERSONS

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TORTS

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CHAPTER I.

INTRODUCTION.

§ 1. Definition of a tort. The word "tort" has been borrowed from the French; it means literally a wrong (1). In its legal meaning, however, the term is not used to include everything which the law treats as a wrong. For example, a crime or breach of contract is a legal wrong, but they are both to be distinguished from a tort. The most important rights protected by the law of torts are those of personal security, of property, of reputation, and of social and business relations.

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(1) The French word "tort" was in turn derived from the Latin "torquere," meaning to twist or bend.

No satisfactory definition of a tort has ever yet been framed. The one which is perhaps most frequently given is as follows: "A tort is a wrong arising independently of contract for which the appropriate remedy is a common law action." This, however, is too broad because it includes obligations in quasi contract. Besides, the definition merely serves in a negative way to distinguish a tort from a crime on the one side and from a breach of contract on the other.

§ 2. **Torts distinguished from crimes.** A crime is an offense against the state and is punished by the state. Common examples of crime are larceny, burglary, arson, and murder. A tort, on the other hand, is an offense against the individual and is redressed by making the party who commits the tort compensate the party whose rights have been infringed. This is usually done by making the former pay damages to the latter.

A crime generally involves a tort. That is, an act which injures the state or society in general is usually also a wrong to a private individual as well. For example, if A steals B's watch, he may be punished by the state for committing larceny; the law of torts, on the other hand, may also compel A to recompense B either by forcing him to give up the watch to B, or to pay him the value of it if the watch cannot be found. Some crimes do not involve torts; for example, an attempt to commit suicide is in many jurisdictions a crime; but it is not a tort because no other individual is injured by it.

On the other hand, many torts are not crimes because they are not of such serious character as to deserve

punishment. The important class of torts where the defendant has acted negligently is a good example. If A carelessly drives an automobile against B, it may be a tort, but unless the carelessness amounts to recklessness, it will not be punished as a crime.

§ 3. **Torts distinguished from breaches of contract.** One of the essentials of a contract is an agreement; and the breach of the contract is the failure to carry out the agreement. Liability in tort, on the other hand, is not based upon any agreement between the parties; it is imposed by the law without the assent of either party. For example, if A wishes to recover against B for failing to put up a house for him, he would need to show that B had previously agreed to do it. But if A wishes to recover against B for taking away A's horse, it will not be necessary to show any agreement to that effect; B is under a duty to respect the rights of A in his property, without any agreement to do so. This is what is meant by a duty imposed by law without the consent of the parties.

§ 4. **Difficulty of classifying torts.** Until very recent years there was no general law of torts, and even yet this branch of the law has not been as thoroughly systematised as the law of crimes or the law of contracts. On the other hand, some of the particular torts such as trespass, nuisance, and deceit have a history of several centuries, and the law on these topics can be stated with a fair amount of accuracy. For this reason, it will be more satisfactory to take up the different torts in succession rather than to take up the subject as a whole.

§ 5. **Some characteristics common to all torts.** In the law of contracts the duty on the part of the defendant may be either to do or not to do something, depending upon the terms of the agreement; that is, the duty may be either affirmative or negative. In the law of quasi contracts the duty is always positive, namely, to return to the plaintiff that which in justice belongs to him. For example, if A, wishing to pay money to B, should pay it to C mistakenly thinking that C was B, C would be under a quasi-contractual duty to pay back the money to A. The duty in torts is, generally speaking, negative; that is, one is not liable for a failure to act. If A should see B, a stranger, about to be run over by a railroad train and could easily rescue him, he would not be liable to B in tort if he failed to do so, though such an omission might be morally reprehensible. A tort action will, however, lie for a mere omission against one who has undertaken certain duties, such as that of innkeeper, or common carrier, or employer. For example, if A is engaged in the business of a common carrier he must carry for everyone on equal terms, subject of course to reasonable regulations; if he refuses to carry for X who complies with these regulations, X may recover against him in tort. The modern and sound tendency is to classify such cases under the head of quasi contracts, or better still, as a distinct class called undertakings.

The rights which are protected by the law of contracts, quasi contracts, and undertakings are rights only against certain individuals, while the rights protected by the law of torts are those which are enjoyed against all the world

The rights of personal security, property, and reputation are rights which must be respected by everybody.

§ 6. **Tendencies in the law of torts.** The maxim of the early law was "he that is damaged ought to be recompensed." This meant that if A caused damage to B it made no difference whether A was in any way to blame for the occurrence or not. The tendency of the law of torts, however, is to give the plaintiff relief only if the defendant was in some way culpable; this culpability may be shown by proving that the defendant intended the act which damaged the plaintiff, or that he might have avoided damaging the plaintiff by using the proper amount of care, or that he was engaged in an unlawful act or an extra-hazardous act at the time the plaintiff suffered the injury.

The early law gave protection only against the simpler and more direct violations of the plaintiff's rights. The tendency, however, is toward extending the protection to violations which are less direct and more difficult to trace to the defendant; so that the goal of the law of torts is protection against any unjustifiable infringements of one's rights, or as it is expressed in the maxim, "there is no wrong without a remedy."

§ 7. **Differences between intent, negligence, and accident.** If A is driving on the highway and drives over B, he may do this either intentionally, negligently, or accidentally. That is, he may desire to run over B (intent); if he does not desire it he may not use the proper amount of care not to run over him (negligence); and if he does not desire it and drives carefully it is then called an ac-

cident. Intent is thus seen to be a state of mind, negligence is a kind of behavior, while accident, as the word is often used in a legal sense, is the negation of both intent and negligence. As will be seen later, accident is generally a defense unless the defendant was engaged at the time in an unlawful or an extra-hazardous act. The torts which are first discussed, trespass, conversion, and deceit, are generally intentional, except trespass which is frequently the result of carelessness. After these, are discussed in order the subjects of negligence and liability for accident.

§ 8. **Intent distinguished from motive.** The difference between intent and motive is briefly this: a defendant acts intentionally when he desires a particular result, without reference to the reason for such desire. Motive, on the other hand, is the reason why the defendant desires the result. Motive is material only in those torts discussed in the later chapters—defamation, malicious prosecution, and malicious interference with business and social relations.

CHAPTER II.

TRESPASS.

SECTION 1. IN GENERAL.

§ 9. Rights protected by the law of trespass. The rights protected by the law of trespass are those of personal security and of property. It affords protection, however, only against such violations as are direct and accomplished by physical means—that is, by force.

§ 10. Definition and classification of trespass. Trespass, in its legal sense, may be defined as a direct physical violation of the right of personal security or the right of property. The form of action at common law for the redress of such violations was also called trespass.

Direct physical violations of personal security—that is, trespass to the person—can be effected in either of three ways: by contact with the person, called battery; by threatened contact, called assault; or by deprivation of liberty, called imprisonment. Trespass to property is conveniently classified upon the basis of the kinds of property—trespass to real property and trespass to personal property. These five subdivisions will be discussed in the above order.

§ 11. Different uses of the terms "trespass", "battery", and "assault". As we shall see later, many direct physical violations of the security of person and property

are not torts because they are excusable; examples of such excuses are self-defence and discipline. The plaintiff, however, need neither allege in his declaration nor prove at the trial that it was inexcusable; it is sufficient if he alleges and proves certain essentials which comprise what is called a prima facie case; if he succeeds in doing this it is then incumbent upon the defendant to allege and prove any excuse which he may have, if he wishes to escape liability. The words "trespass," "battery," and "assault" are sometimes used to mean an actionable trespass, an actionable battery, and an actionable assault; at other times they are used to mean merely that all of the essentials are present so that the plaintiff can make his prima facie case, without reference to the question whether the violation is actionable or excusable. Neither of these uses is incorrect, but for the sake of brevity and convenience the terms will be used in the second meaning referred to, unless the term actionable is used with them.

The word "assault" literally means a "jumping upon." It is quite proper, then, to use it as synonymous with "battery." This is the popular use and such use occurs frequently in the cases. Probably its more frequent use, however, is to denote merely a threatened as distinguished from an actual battery; for the sake of convenience the word will be used with this meaning in the following sections.

Section 2. Battery.

§ 12. **Essentials of a battery.** A battery may be defined as contact with the plaintiff's person caused directly

by an intentional physical act of the defendant. These essentials will be discussed separately.

§ 13. **Contact.—Amount of force not material.—Damage not necessary.** The word "battery" means literally a striking or beating. The legal significance of the term, however, is broad enough to include any contact. Thus while the most familiar examples of batteries are those which are accomplished with the hand or fist, there is almost no limit to the ways in which a battery may be inflicted. Throwing water on the plaintiff, kicking him, striking him with a weapon held in the hand, or by a missile hurled from the hand, and wounding with a ball shot from a pistol are all batteries.

Although in most cases of batteries which have found their way into the courts a considerable amount of violence was present, the amount of force used is not material; a mere touching is enough. Hence the plaintiff in order to maintain his action need not allege or prove that he has suffered any loss or damage. If, however, he does not allege and prove any damage or insult he will recover judgment for only a nominal amount, such as one shilling or one cent. This usually entitles him to his court costs in the suit. (For this reason nominal damages have been called a "peg to hang costs on.") In allowing this action where no actual loss has been inflicted the law shows the value it sets upon the right of personal security.

The jealousy of the law in its protection of the person is also shown in its construction of the term "person" in this connection. It is not necessary that there be any

contact with the plaintiff's body. It is enough if it be with articles closely associated with it, such as the clothes he is wearing, the cane he is carrying, the horse he is riding or driving, or the carriage or chair in which he is sitting.

§ 14. **Caused by the defendant.** In Innes v. Wylie (1), the plaintiff was prevented from entering a room by a policeman who acted by order of the defendants. The evidence was conflicting as to whether the policeman remained passive in obstructing the entrance or pushed the plaintiff back. The court instructed the jury that if the policeman remained passive there was no battery committed. If such were the facts it is clear that the act of the defendant's servant in merely standing in the doorway did not cause contact; if there was contact it was caused by the plaintiff himself. On the other hand, where the defendant placed a bar of iron in front of a theater entrance and then cried out "Fire" so that the people in the theater rushed out against the barrier, a battery or rather several batteries were committed. Causing a person to strike against an iron bar is equivalent to causing the bar to strike against him.

§ 15. **Act must be physical and voluntary.** In some torts such as deceit and slander the act of the defendant may consist in a mere speaking of words; in battery, on the other hand, it being a tort committed by force, there must be a physical, bodily act on the part of the defendant.

In Gibbons v. Pepper (2) the plaintiff sued the de-

(1) 1 Carrington and Kirwan, 257.

(2) 1 Ld. Raymond, 38.

fendant for a battery. The defendant pleaded that he was riding upon a horse on a highway; that the horse became frightened and ran away so that the defendant could not stop him and thus the horse ran over the plaintiff against the will of the defendant. The court held that the effect of the plea was to deny that there was a battery. In this case the defendant was acting in the sense that his body was moving, but the activity was involuntary. As the court pointed out, if the defendant by spurring had started the horse it would have been a battery.

§ 16. **"Voluntary" distinguished from "intentional". Intent probably unnecessary.** In ordinary usage "voluntary" and "intentional" are nearly if not quite synonymous. But legally the word "voluntary" is used in connection with the mere physical act of the defendant without reference to the effect of that act upon the plaintiff; "intentional," on the other hand, is used to indicate that the effect of the act upon the plaintiff was desired by the defendant. The terms "negligence" and "accident" are also used with reference to the effect of the defendant's act as distinguished from the act itself. It seems that a battery may be inflicted negligently or accidentally (2a). It is doubtful whether an action lies for a negligent contact without actual damage (2b), though damage is not usually necessary for a battery.

§ 17. **Contact must be caused directly.—Distinction between trespass and trespass on the case.** In early times

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(2a) Brown v. Kendall 6 Cush. 292; James v. Campbell, 5 C. & P. 372. Compare The Lord Derby, 15 Fed. 265.

(2b) Dulieu v. White, [1901] 2 K. B. 669.

under a ruder state of civilization wrongs were of a comparatively simple character; the remedies devised for the redress of such wrongs—such remedies as trespass and debt—were correspondingly simple, and, the law always tending to crystallize, these remedies became limited to the redress of these primitive wrongs. As civilization advanced the narrowness of these actions became more apparent and more unjust. As was pointed out in § 9, above, the law of trespass gave protection against only direct violations of the security of person and property; for indirect violations there was practically no remedy. In 1285 Parliament by the statute of Westminster II. provided that if any cause of action arose for which no remedy had been provided, a new writ was to be formed analogous to those already in existence. The clerks in chancery whose duty it was to formulate and issue these new writs, took the action of trespass as a model and at first called all the writs issued by virtue of the statute "trespass upon this special case." This was successively abbreviated to "trespass on the case," "action on the case" and finally to "case." In order to bring this action it was not necessary to show a direct application of force, but to offset this the plaintiff was required to set forth all the facts and with some exceptions to allege and prove special damage. If then contact with the plaintiff's body is not caused directly so that the action of trespass for a battery can be brought, the plaintiff may still have a remedy—action on the case—if he can prove special damage. Although by procedural reforms in this last century a plaintiff will not lose because he brought trespass

instead of case, or case instead of trespass, the distinction is still important because of this requirement of special damage.

The precise dividing line between "direct" and "indirect" has never been thoroughly worked out, but the general distinction is fairly simple. The stock illustration is the following: If A throws a log into the highway and it strikes B in falling, it is a battery and trespass is the proper action; if, however, B's injury is due to stumbling over the log after it has been thrown there, it is not a battery and B must sue in case and prove special damage.

Trespass may be brought for all direct contacts, and must be brought for all intentional, direct contacts. Case must be brought for all indirect contacts and may be brought for all unintentional direct ones. As regards the latter it is concurrent with trespass. See the article on Pleading, §§ 38-39, in Volume XI of this work.

Section 3. Assault.

§ 18. **Essentials of assault.** While battery is probably the oldest wrong for which the law gave redress, assault is comparatively recent. In one of the earliest cases of assault—reported about 1350— the defendant had been pounding at night on the door of a tavern; the plaintiff put her head out of a window and told him to stop; the defendant threw a hatchet at her but did not hit her. The plaintiff was allowed to recover.

The essentials of assault are an apparent attempt on the part of the defendant to commit a battery on the

plaintiff, thus causing the plaintiff reasonable apprehension of a battery. The apparent attempt is made up of these elements: a physical act, an apparent intent, and an apparent present ability to commit a battery.

§ 19. **The physical act.—Mere threats not enough.** A physical, bodily act is just as necessary here as in the law of battery. Though an assault is sometimes briefly defined as threatened battery, a mere threat to commit battery is not enough. Any physical act which seems likely to result in a battery is sufficient. In Read v. Coker (3) the defendant, a paper stainer, collected his workmen around the plaintiff; they tucked up their sleeves and aprons and threatened to break his neck if he did not leave the shop. This was held to be an assault.

§ 20. **The apparent intent.—How shown.** In Stearns v. Sampson (4) the defendant, a landlord, gave his tenant, the plaintiff, notice to leave; upon the plaintiff's refusal, the defendant had some of the furniture removed, took off some doors and windows and placed a bloodhound in another part of the house. These acts while causing discomfort and embarrassment to the plaintiff did not amount to an assault, there being no apparent intent to commit a battery.

While threats alone do not constitute an assault, what the defendant says to the plaintiff at the time of the act may be important in determining whether the apparent intent was present. In Tuberville v. Savage (5) the de-

(3) 13 C. B. R. 850.
(4) 59 Me. 568.
(5) 1 Mod. Rep. 3.

fendant put his hand on his sword and said to the plaintiff: "If it were not assize time (i. e., if court were not in session now), I would not take such language from you." This was held not to be an assault because the words communicated to the plaintiff showed to him by implication that the defendant did not intend to commit a battery. In United States v. Richardson (6) the defendant raising a club over the head of the prosecuting witness said to her that if she said a word he would strike her; this was held to be an assault. It would have been an assault if the defendant had said nothing and the words used here could not place the defendant in any better position because they imposed a condition he had no right to impose. This was a criminal prosecution; but where the defendant is guilty of an assault in the law of crimes he is also usually liable for an assault in the law of torts. Where the defendant points a gun at the plaintiff declaring that he does not intend to shoot, it would seem that the defendant ought nevertheless to be liable for an assault; because of the extreme danger of thus handling a deadly weapon, the assurance would usually not prevent the plaintiff from being put in fear.

§ 21. **The apparent intent.—Actual intent not necessary.** It is not the secret intent that is controlling, nor the intent as it would appear to a bystander but as it appeared to the plaintiff—or more accurately, as it would appear to a reasonable person standing in the position of the plaintiff. Thus if the defendant points a pistol at the

(6) 5 Cranch, 348.

plaintiff in a threatening manner, it is no defense that the defendant really did not intend to shoot but merely meant to frighten the plaintiff.

§ 22. **The apparent present ability.—Actual present ability not necessary.** There must be apparent present ability to commit a battery; for example, if the defendant attempted to throw a missile at the plaintiff, who was so far away that the missile could not possibly reach him, it would not be an assault. In Stephens v. Myers (7) the defendant, threatening to pull the plaintiff out of his chair, advanced toward him but was stopped by X, who sat near the plaintiff. The court instructed the jury that if the defendant was advancing so that his blow would almost immediately have reached the plaintiff if he had not been stopped, it was an assault.

Actual present ability is not necessary. Thus if the defendant points a gun at the plaintiff at close range, the fact that the gun was not loaded or was only at half cock would not prevent its being an assault if these facts were not known to the plaintiff.

§ 23. **Plaintiff's apprehension.—Actual fear not necessary.** The fact that the physical prowess of the plaintiff is so much greater than that of the defendant that the plaintiff is not frightened by the attack does not prevent the cause of action arising. The test is not actual fear but being put in apprehension of contact. A rash apprehension of contact is not enough—at least in the absence of knowledge on the part of the defendant that the

(7) 4 C. & P. 349.

plaintiff is very easily frightened. A plaintiff is not entitled to special consideration because of a delicate nervous system unless the defendant knows of it.

§ 24. **Apparent intent necessary.—Negligence not enough.** In Victorian Railways Commissioners v. Coultas (8), by the negligent act of the defendant's servant in charge of a gate at a railroad crossing the plaintiffs while driving across were placed in imminent danger of being killed and the female plaintiff suffered a severe nervous shock and subsequent illness. The plaintiff was held to be without a remedy. Trespass for battery would not lie because there was no contact; trespass for assault would not lie because there was no apparent intent; an action on the case would not lie because although a nervous shock is damage for which recovery may be had where an action of trespass is allowed, it is not considered such special damage as to be the basis of an action on the case. Physical illness as distinguished from nervous shock is recognized as such special damage and some courts so recognize it where the physical illness was caused by the nervous shock; in some jurisdictions, therefore, the plaintiff in the case stated above would have been allowed to recover (8a.)

§ 25. **Does a battery always include an assault?** It is very often stated in the cases and text-books that a battery always includes an assault. Inasmuch, however, as a reasonable apprehension of a battery is an element of assault, it would seem that a battery on a plaintiff

(8) 13 App. Cases, 222.

(8a) Purcell v. St. Paul Ry., 48 Minn. 134.

when asleep or otherwise not aware of the impending trespass would not include an assault.

Section 4. Imprisonment.

§ 26. **Essentials of imprisonment.** Trespass for imprisonment lies where the plaintiff has been completely deprived of his liberty by the defendant. This deprivation of liberty may be effected either by physical enclosure, by arrest, or by fear of physical restraint other than arrest.

§ 27. **Deprivation of liberty must be complete.—Physical enclosure.** In Bird v. Jones (9), the defendant had so obstructed a highway that the plaintiff could not pass; he was free, however, to go back the way he had come. It was held that this did not amount to imprisonment because it was only a partial obstruction and not a complete enclosure. So if the plaintiff were placed in a room which had a means of escape, he would not be imprisoned if the means of escape were reasonably safe—for example, through a window which is near the ground. Perhaps the simplest case of being completely deprived of one's liberty is that of being locked up within the walls of a prison or other physical enclosure. Such an enclosure need not be stationary—for example, being set adrift in a boat without oars or other means of locomotion may amount to imprisonment.

§ 28. **Arrests.—How made.** Arrests are usually made by sheriffs, constables or other peace officers, but any

(9) 7 Q. B. Rep. 742.

private individual may also arrest. The question as to when arrests are justified will be discussed below, Chapter III, §§ 87-104. An arrest may be accomplished in either of two ways: by the defendant touching the plaintiff with intent to take him into custody, the plaintiff being told that he is arrested; or by plaintiff submitting to apparent power to apply force to take him into custody.

§ 29. **Touching the plaintiff with words of arrest.** In Russen v. Lucas (10) the question was whether the defendant, a deputy sheriff, had arrested H. Defendant said to H: "Mr. H, I want you." H replied: "Wait for me outside the door and I will come to you." The officer went out to wait and H went out at another door and got away. The court held that H had not been arrested, there being neither a touching nor submission. Touching the plaintiff and telling him that he (the defendant) has a warrant for his arrest is not sufficient without also telling the plaintiff that he is arrested; the defendant must intend the touching to be an arrest and the plaintiff must so understand it.

§ 30. **Words of arrest and submission.** In Pike v. Hanson (11) the defendants were selectmen of a town in which the plaintiff owned some property; they levied an assessment of taxes and committed it to B for collection. B, after notice to the plaintiff to pay the tax, being in the same room with her, called upon her to pay the tax which she declined to do till arrested. B then told her that he

(10) 1 C. & P. 153.

(11) 9 N. H. 491.

arrested her and she thereupon paid the tax. This was held to be an imprisonment; the submission was shown here by paying. Submission is usually shown by going with the person making the arrest. But such an act is not conclusive evidence of submission. In Arrowsmith v. LeMesurier (12) although the plaintiff accompanied the constable before the magistrate there was held to be no arrest because there was no declaration of arrest on the one hand or submission on the other, the warrant for arrest being used only as a summons indicating to the plaintiff that he was required to appear in court. So if a person goes willingly with the officer in order to investigate the matter on his own account, there would seem to be no submission.

§ 31. **Arrest requires personal presence.** Though the defendant need not be strong enough physically to overpower the plaintiff, he must be near enough so that there is apparent power to use force with a view to taking him into custody if he should not submit. Hence arrest by a person at a distance—for example, by telephone—is impossible, words of submission to words of arrest in such a case being nugatory.

§ 32. **Fear of physical restraint other than arrest.** In Fotheringham v. Adams Express Co. (13) the plaintiff was for two weeks constantly guarded by detectives employed by the defendant for that purpose so that he was at no time free to come and go as he pleased; he was sub-

(12) 2 B. & P. N. R. 44.

(13) 36 Fed. Rep. 252.

jected to repeated examinations in regard to a certain robbery, of such a character as to imply that he was regarded as a criminal and that force would be used to detain him if he should attempt to assert his liberty. The court held that the jury were justified in finding that the plaintiff was deprived of all freedom of action and was therefore imprisoned. A restraint by threats other than those of physical force, such as threats of a law suit or of defamation will not constitute imprisonment (13a).

§ 33. **Does an imprisonment always include a battery and an assault?** It is sometimes said that an imprisonment always includes a battery and an assault. Since an arrest may be effected by submission without touching the plaintiff and without any physical act putting him in apprehension of a battery, it is evident that the statement is incorrect. In many cases of imprisonment—for example, arrest by touching the plaintiff with words of arrest—it is accurate to say that there is an imprisonment, a battery, and an assault.

Section 5. Trespass upon Real Property.

§ 34. **Essentials of trespass upon real property.** A trespass upon real property consists in an intentional or negligent touching of land in the possession of the plaintiff caused by a voluntary act of the defendant.

§ 35. **Meaning of "land".—Entry beneath and above the surface.** It is well settled that a trespass may be committed by an entry beneath the surface as well as upon it. For example, if A is digging beneath the surface of

(13a) Payson v. Macomber, 3 Allen, 69.

his own land and extends the excavation underneath the surface of B's land adjoining, it is a trespass. In Smith v. Smith (14) the eaves of the defendant's barn projected over the plaintiff's land; this was held to be a trespass. So are telegraph wires over a person's land, or the intrusion of an animal's head over a fence. Whether the passing of a balloon or airship over the land so high as not to affect its occupation constitutes a trespass seems not to be settled either in England or in this country.

§ 35a. **Overhanging trees not a trespass.** The overhanging branches of trees do not constitute a trespass, but are considered to be merely a permissive nuisance (15). The result of this is that the plaintiff may not recover without proving special damage; but on the other hand, he may disencumber his land by cutting off the branches and the roots up to the boundary line, and this right is not barred after twenty years as a right to bring an action of trespass would be. The distinction between this case and the case of the projecting eaves is perhaps due to the fact that the former is due to natural growth, while the latter is wholly artificial.

§ 36. **Actual enclosure and special damage not necessary.** Though the old form of declaration in trespass upon real property contained an allegation that the defendant "broke the close," an actual enclosure such as a wall or fence is not necessary; it is enough if the defendant crosses the boundary even though there is nothing to

(14) 110 Mass. 302.

(15) (1894) 3 Ch. D. 1.

show where the boundary line is. As in the law of trespass to the person, special damage need not be proved. The land which one occupies thus partakes of the inviolability of his person. Even though the defendant should benefit the land—for example, by cultivation—it is nevertheless a trespass. The chief advantage of this is that where there is a dispute as to the right of possession the point may be raised at once by litigation. Since the matter may be litigated without waiting for damage to be inflicted, the statute of limitations against the bringing of the action will begin to run at once.

§ 37. **Act of defendant must be voluntary.—Need not be intentional.** In Smith v. Stone (16) the defendant pleaded that he was carried upon the plaintiff's land by others through force and that he was not there voluntarily. The court held that the effect of the plea was to deny that any trespass was committed.

In Guille v. Swan (17) the defendant went up in a balloon and unintentionally descended into the plaintiff's garden; the defendant was held liable, on the ground of negligence, not only for his own entry but also for the trespasses committed by persons who being attracted by the descent of the balloon ran in and damaged the garden.

Section 6. Trespass upon Personal Property.

§ 38. **Essentials of trespass upon personal property.** A trespass upon personal property may be effected either

(16) Style, 65.

(17) 19 Johns, 381.

by removal, by taking possession, or by injury or destruction. As in the law of trespass to the person and to real property, the defendant's act must be voluntary and the force must be applied directly.

§ 39. **Removal and taking possession.** In Bruch v. Carter (18) the defendant untied the plaintiff's horse and removed him a short distance from the hitching post to which his owner had fastened him. This was held to be a trespass. Removal is not necessary however. In Miller v. Baker (19) a deputy of the defendant, a sheriff, took the possession of some nursery plants and shrubs; he neither touched the property nor attempted to remove it. The court held that the defendant was liable in trespass.

§ 40. **Injury or destruction.—Mere touching not a trespass.** Where the defendant neither takes possession of the property nor removes it, he may still be liable in trespass if he injures or destroys it. A mere touching of the property, however, without causing damage, does not amount to a trespass. The common law does not protect personal property to the same extent that it does real property. The reason for this is that in early times personal property was so comparatively unimportant that such trivial injuries to it as mere contact were redressed, if at all, in the local courts rather than in the king's courts; and thus no common law writ was ever issued in such a case.

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(18) 3 Vroom (N. J.), 554.

(19) 1 Metc. (Mass.), 27.

§ 41. **Contact must be caused directly.—Need not be intentional.** As in the previous sections, the force must be applied directly. In Cole v. Fisher (20) the plaintiff brought trespass against the defendant for firing a gun by which the plaintiff's horse was frightened and ran away with his chaise and broke and spoiled it. The court held that if the horse and chaise were in plain sight and were near enough to be supposed to excite any attention or caution on the part of the defendant, and the distance was such that by common experience there might be a reasonable apprehension of frightening the horse by the discharge of the gun, the defendant was liable in trespass even though he did not intend to frighten the horse. Causing the horse to run away and destroy the chaise was equivalent, in such a case, to breaking it up with an ax.

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(20) 11 Mass., 137.

CHAPTER III.

EXCUSES FOR TRESPASS.

Section 1. Accident.

§ 42. **Excuses for trespass: In general.** In the previous chapter we have been considering what the plaintiff must prove to make out a prima facie case of trespass. In this and the sections following we shall assume that a trespass has been committed by the defendant and discuss some of the excuses that the defendant may set up to show that he ought not to be liable for the trespass. It is sometimes said that "a man has a right to do what he will with his own," as if that were an absolute right. The truth is, however, that most of our rights are qualified in various ways because of the interests of society as a whole or the conflicting rights of other individuals. There are few, if any, absolute rights.

§ 43. **Accidental trespass: The early law.** As was pointed out in § 7, above, accident in its legal sense negatives both intent and negligence. Hence an accidental trespass is one which the defendant caused without intending it and while using due care for the safety of the plaintiff's person or property.

The development of the law as to accident may be roughly divided into three stages. In the first stage it was no excuse, the maxim "he that is damaged ought

to be recompensed" being applied without reference to whether the defendant was in any way to blame for the occurrence. It was enough that defendant's voluntary act caused the injury. The second stage is illustrated by the case of Weaver v. Ward (1). Here plaintiff brought trespass for assault and battery. The defendant pleaded that he and the plaintiff were soldiers in the same company; that while they were engaged in a skirmish for military exercise the defendant by chance and against his will did hurt and wound the plaintiff while discharging his piece. It was held that this did not set out a good defense; but that the defendant should have set out facts showing that it was utterly without his fault. Accident is thus held to be an excuse to be shown by the defendant, the test of due care being perhaps more severe than it is at the present day.

§ 44. **Same: Modern law.** In Brown v. Kendall (2) the plaintiff brought trespass for assault and battery. The defendant in attempting to separate two fighting dogs—one belonging to the defendant and the other to the plaintiff—struck the plaintiff in the eye with a stick with which he was beating the dogs. The court charged the jury that if it was not necessary for defendant to interfere, although proper for him to do so, he was liable unless he used extraordinary care; that if the act of interference was unnecessary then the burden of proving extraordinary care is upon the defendant. This charge was held to be incorrect in requiring extraordinary care in-

(1) Hobart, 134.

(2) 6 Cushing (Mass.), 292.

stead of the care of a prudent man under the circumstances, and also in placing the burden of proof upon the defendant instead of the plaintiff. It has always been the rule that where the plaintiff was forced to bring an action on the case because the injury was indirect, he must allege and prove that the defendant was culpable. The effect of Brown v. Kendall is to apply this rule in case of trespass. Accident thus becomes more than a mere excuse to be shown by the defendant; it is practically a denial of the trespass since the plaintiff must prove that it was not accidental, and this is the third stage of the law.

§ 45. **Accident caused by an unlawful act.** In James v. Campbell (3) the plaintiff brought trespass for an assault and battery. The defendant and one Paxon had a quarrel and proceeded to blows, in the course of which the defendant struck the plaintiff and gave him two black eyes. The court held that the defendant was liable even though he did not strike the plaintiff intentionally. The case was apparently one of accident, but the defendant was properly held responsible because he was engaged at the time in an unlawful act—namely, the breach of the peace with Paxon. If the defendant had been lawfully defending himself against an attack by Paxon, the defendant ought not to have been held liable.

Other cases of liability for accident will be discussed in Chapter VII, §§ 230-46, below.

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(3) 5 Carrington & Payne, 372.

Section 2. Mistake.

§ 46. Mistake distinguished from accident. As has been pointed out, accident means the negation of intent and negligence. Mistake assumes an intent to do the injurious act but an error as to its legal effect or some collateral circumstance. A carefully shoots at a mark and the ball glances from the target, killing B's dog. A did not intend to hit the animal—it is an accident. But if A saw an animal approaching and shot it, thinking it to be a wolf, and it proved to be B's dog, this is a mistake. He intended to kill the animal, but was mistaken as to its identity. The test is always: Did defendant intend the injury complained of? If he did, but thought he had a right to do it, it is a mistake. If he did not, it is accident or negligence. In the Nitro-Glycerine case (4), the defendant express company was transporting some nitro-glycerine reasonably thinking that it was sweet oil; the nitro-glycerine exploded and damaged the plaintiff's property. Here, in popular language, there was a mistake as to the material being carried, but the injury complained of from the explosion was not intended, so it was legally a case of accident, not of mistake, and defendant was not liable.

The mistakes which are discussed in this section are mistakes as to the legality of the defendant's act and presuppose that the defendant intended the result.

§ 47. Mistake of title.—Trespass upon real property. In Basely v. Clarkson (5) the plaintiff brought trespass

(4) 15 Wall. 524.

(5) 3 Levinz, 37.

for breaking his close and cutting his grass and carrying it away. The defendant pleaded that his own land adjoined that of the plaintiff, and in mowing his own land he by mistake mowed down some grass upon the plaintiff's land, intending to mow only his own grass. The court held that the plea was not a good one because the act was voluntary (that is, intentional); that his knowledge was immaterial because it could not be shown. Though matters of knowledge are now judicially passed upon every day so that the reason given by the court no longer exists, the law is still in accordance with the decision, that mistake of title is no excuse for a trespass upon real property. This is true even though the mistake were made reasonably and in good faith. In Basely v. Clarkson the defendant intended the result: that is, he intended to cut the grass which he did cut, though he probably would not have intended it if he had known that the grass belonged to another. If the scythe had slipped from the defendant's hand and accidentally gone across the boundary line and cut some grass, the defendant would not have been liable, as we have just seen in the previous sub-section.

§48. **Mistake of title.—Trespass upon personal property.** In Higginson v. York (6) one P had cut some wood upon an island belonging to the plaintiff; he purported to sell it to one K, who in turn purported to sell it to the defendant, who paid K full value for the wood thinking that K owned it. The defendant and K removed the wood and the plaintiff brought an action of trespass against the

(6) 5 Mass., 341.

defendant for thus carrying it away. The court held the defendant liable, the mistake as to the ownership of the wood being no excuse.

§ 48a. **Criticism of the rule.** If our law were thoroughly logical, probably a mistake which has been made in good faith and without negligence should excuse just as accident generally does; though, of course, if the defendant acquired any property by his trespass he would be, as now, under a duty to return it or pay for its value. But the life of the law—especially of non-contractual law—is not so much logic as experience. The rule as to mistake of title was settled early when absolute liability was the basis of the law; it works fairly well; there has been no change, and perhaps none is likely.

§ 49. **Excusable mistakes.** As will be pointed out in § 99, below, an officer acting under judicial process is generally held liable if by mistake he arrests the wrong person. On the other hand there are some cases where the defendant has been held to be excused by a mistake made in good faith without negligence—the courts in such cases being influenced more by the modern than by the old rule of tort liability. In Paxton v. Boyer (7) the defendant had been struck and knocked down by the plaintiff's brother; on rising the defendant, thinking that it was the plaintiff who had inflicted the blow, struck the plaintiff with a knife. The jury found that the blow was struck by the defendant under circumstances that would have led a reasonable man to believe that it was necessary

(7) 67 Ill., 132.

to his proper self-defence. The court held that the defendant was not liable. This is generally held as to reasonable mistake committed in some pressing emergency, such as defence of self or other persons from violence, where there is no opportunity for investigation before acting. The same is true in cases of discipline (8).

Section 3. Consent, or Leave and License.

§ 50. **General rule: Volenti non fit injuria.** The general rule is that consent is a complete bar to an action of trespass; the old Latin maxim was "volenti non fit injuria," which means, he that consents is not legally wronged. This applies to trespasses to both person and property. Thus if a surgeon cuts off A's arm or takes out his eye with A's consent, the trespass is excused; so if the defendant walks across the plaintiff's land or carries away his chattels with the plaintiff's leave, the plaintiff can not recover for the act. The consent need not be to the specific injury; thus if one enters a foot-ball game he consents to all acts done in accordance with the rules of the game.

Consent is not a defence if it is procured by fraud, or, as it is frequently expressed, fraud vitiates or avoids the consent. Force or threats of force likewise avoid consent—if indeed it can be properly called consent where the plaintiff yields under such circumstances.

§ 51. **Proof of consent.** Consent may be given in express terms or it may be implied from the circumstances.

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(8) Heritage v. Dodge, 64 N. H. 291.

In Wartman v. Swindell (9) the defendant was sued for taking the lines off the plaintiff's horse. At the trial it appeared that the defendant did it as a joke; and if it had been shown that the previous relations of the parties were such that consent to such a joke could be fairly implied, it would have been a defence.

§ 52. **When consent is against public policy.** In Bell v. Hansley (10) the plaintiff brought trespass for an assault and battery; the evidence tended to show that the parties fought by mutual consent. The court instructed the jury that the plaintiff was nevertheless entitled to recover, the consent going merely in mitigation of damages. This charge was held to be correct. The effect of this is that each party to such a mutual combat may recover from the other. It being desirable to prevent illegality of this character the practical question is whether giving or refusing an action to the parties concerned will be most effectual to this end. The courts have thought fear of suit a greater restraint in such cases than knowledge of an opponent's impunity from all but a criminal action.

Section 4. Self Defence.

§ 53. **Early law as to self-help in general.** Defending one's person, defending one's property, recovering one's property and abating nuisances are all called self-help; that is, one protects his own rights instead of appealing to the courts for redress. The early law discouraged this. There were two reasons for this attitude; one was

(9) 54 N. J. L. 589.
(10) 3 Jones (N. C.), 131.

that it was considered too much of a refinement to look beyond the doing of the act; the other was that there was too much self-redress in the roughness of society and the courts wished to encourage litigation as a more peaceable means of settlement. As civilization advanced the position of the courts as the acknowledged arbiters of wrongs became so well established and the business of the courts was so much increased that a certain amount of self-help became legalized.

§ 54. **When the right of self defence arises—Provocation.** One does not need to wait till a battery has been committed upon him before acting in defence; the right arises when a battery is attempted—that is, when one has been assaulted. Mere threats or other provocation such as calling one a liar or a thief give no right to use force; the only effect of such provocation is to reduce the amount of damages which the plaintiff is entitled to recover.

§ 55. **Extent of the right.** In Ogden v. Claycomb (11) the court instructed the jury that even though the plaintiff had exceeded the bounds of self defence and inflicted an inhuman beating, the plaintiff could not recover provided that the defendant desisted as soon as the plaintiff asked him to do so. This charge was held to be wrong, the upper court saying that the rule was that no more violence can be used than what a reasonable man would under the circumstances regard necessary to his defence. Not only must the force used in defence be in proportion

(11) 52 Ill., 365.

to the force used or about to be used by the assailant; the force must be of a kind calculated to repel the attack. Thus if the attack is made without a weapon it would not usually justify defending one's self by using a deadly weapon and maiming the assailant.

§ 56. **Right to kill in self defence.** If human life is not imperiled, one is never under a legal obligation to retreat from an attack; he may stand his ground and oppose force to force. If, however, he can defend himself only by killing his assailant or endangering his life, he must retreat if it is reasonably safe to do so. When retreat is not reasonably safe he may kill in order to save his own life.

§ 57. **Effect of exceeding the bounds of self defence.** In Dole v. Erskine (12) the plaintiff sued in trespass for an assault and battery. The defendant's plea was that though the defendant had assaulted the plaintiff as alleged in the declaration, the plaintiff in defending himself against the assault used unnecessary and excessive force. The court held that the plea was not sufficient and that the plaintiff could recover. It seems to be well settled that if one properly defends himself against an attack he does not thereby forfeit his legal redress for the attack; the right of self defence is thus an additional right. Dole v. Erskine decides that the right of action is not forfeited even if he does exceed the legal bounds of self defence. The effect of this is that in such a case each party has a right of action against the other; the party

(12) 35 New Hampshire, 503.

first assailed for the first assault or battery; the other, for the excess of force used in repelling the attack.

§ 58. **Right of defence against animals.** In the previous paragraphs we have been discussing the right to repel an attack made by a human being. Animal life being much less valuable than human life, the right to defend one's person against an attack by an animal is correspondingly greater. One may even kill though his life is not in danger and is never bound to retreat, except perhaps in case of valuable and useful animals. In Morris v. Nugent (13) the plaintiff brought trespass for shooting and killing his dog. The court held that if the dog was attacking the defendant at the time, it was a good defence even though the dog was not of a mischievous disposition; but if the dog was running away after the attack, the killing was not justified. If, however, it was reasonable to believe that the dog would immediately return for another attack, it would seem that the defendant should have the right to kill.

§ 59. **Right to defend other persons.** The same amount and kind of force that may be used in defending one's self may be used by a husband to defend his wife, by a wife to defend her husband, by a parent to defend his child and by a child to defend his parent. The right probably extends to all near family relations. A servant may defend his master. The right of a master to defend his servant has been denied on the ground that the master had a right of action in such a case. Since this reasoning

(13) 7 Carrington v. Payne, 572.

is no longer considered sound, such a right on the part of the master ought now to be recognized. Whether there is any right to defend a stranger beyond that involved in the right to interfere to prevent the commission or continuance of felonies and breaches of the peace and in the right to interfere to preserve human life, is not clear. If such a right exists, much less latitude would be allowed than in self defence.

Section 5. Defence of Property.

§ 60. **Right to kill in defence of property.** There is no right to take human life in defence of property except when necessary to repel an attack made upon one's dwelling house, or to prevent a felony of violence, like highway robbery. This is an extension of the right of self defence.

§ 61. **Right to use force in defence of personal property.** The right to use force to resist an attempt to carry away chattels has long been recognized. In a case decided in 1470 the justices held that "if a man will take away my goods, I may lay my hand upon him and prevent him; and if he will not desist, I may beat him rather than let him carry them off." If the other party should actively resist, it would give rise to the right of self defence which was discussed in the previous section.

§ 62. **Right to remove trespassers from real estate.** In Commonwealth v. Clark (14), which was a criminal prosecution for an assault and battery, the defendant had entered the premises of one Briggs and was using his

(14) 2 Metcalf (Mass.), 23.

grindstone; Briggs requested him to leave but he refused to do so; Briggs thereupon used force to put him off and the defendant in resisting committed the alleged crime of assault and battery. The case turned upon whether Briggs was justified in committing the battery upon the defendant. The court held that Briggs was entitled to use force which was appropriate in kind and suitable in degree to accomplish the removal of the defendant; that the kind and degree of force which was proper depended upon the conduct of the trespasser in each case and was a question for the jury.

Generally the right is to push or carry off the trespasser; there is no right to strike unless there is active resistance. Where the trespasser has entered forcibly there is no need to request him to depart; but if he has entered peaceably, as in the case of Commonwealth v. Clark, there must first be a request to leave before force can be properly used to effect his removal.

§ 63. **Right to kill animals to prevent destruction of property.** In Leonard v. Wilkins (15) the plaintiff sued the defendant for shooting his dog. In their decision the court said: "The dog was on the land of the defendant in the act of destroying a fowl; and the defendant was justified in killing him, in like manner as if he was chasing and killing sheep, deer, calves, or other reclaimed and useful animals. This principle has been frequently and solemnly determined. It was for the jury to determine whether the killing was justified by the necessity of the

(15) 9 Johnson (N. Y.), 233.

case, and as requisite to preserve the fowl; and the fowl being on the land of the defendant was enough, without showing property in the fowl." One of the elements to be considered in such a case is the proportion between the value of the animal killed and the value of the property about to be destroyed by it. If the disproportion is very great, the right probably does not exist:—for example, there is probably no right to kill an animal known by the defendant to be worth $500 in order to prevent the destruction of property worth a few cents.

§ 64. **Right to kill trespassing animals.** There seems to be no right at common law to kill animals merely because they are trespassing. The right to kill trespassing poultry after notice in towns and cities has been occasionally given in recent statutes and ordinances. In Clark v. Keliher (16) the plaintiff's hens had been trespassing upon the defendant's lot which adjoined that of the plaintiff. The defendant requested the plaintiff to shut up his hens and threatened to kill them if they were not kept off his lot. The plaintiff declined to do so and the defendant killed the whole lot of hens, which were worth five dollars, and put them down in the plaintiff's door yard. The court held that the defendant was not justified.

§ 65. **Right to remove trespassing animals.** In Davis v. Campbell (17) the plaintiff sued the defendant in trespass for injury to the plaintiff's cow by means of a dog.

(16) 107 Mass., 406.

(17) 23 Vermont, 236.

The cow had entered the defendant's land from the highway and was doing damage; the defendant caused the cow to be driven away by means of a dog which bit and injured her. The dog was of medium size, not of a ferocious disposition, and was such a dog as a prudent farmer would use in driving his own cattle from his enclosure; the defendant used such care as a prudent farmer would have used in the management of his own property under like circumstances. It was held that the defendant was justified. In Gilman v. Emery (18) the plaintiff had hitched his horse to the defendant's shade tree in the highway; the defendant removed the horse and tied him to a post a few feet away. There being no charge of negligence, the defendant was held justified in thus removing the horse to protect the tree.

§ 66. **Right to remove inanimate property from land. —Notice.** In Rea v. Sheward (19) the plaintiff had left some of his goods upon premises which he had leased to the defendant; the defendant thereupon removed them to the land of the plaintiff adjoining, that being a convenient place for depositing them. The court held that though the defendant might have impounded the goods he was not bound to do so, but was justified in thus returning them to the plaintiff. So, if a tenant does not remove his goods within a reasonable time after giving up possession, the landlord may remove them to a safe place. In Burgess v. Gaffam (20) the defendant had had

(18) 54 Maine, 460.
(19) 2 M. & W., 424.
(20) 18 Fed. Rep., 251.

plaintiff's house and lot sold on execution for a small debt, and having allowed the year of redemption to expire without actual notice to her, entered the house, which was vacant, and removed the plaintiff's furniture. The court held that this was not justified since the plaintiff was entitled to notice that the goods were unlawfully there and an opportunity to remove them herself. Notice is only necessary in cases where the property came upon the premises lawfully.

Section 6. Recovery of Property.

§ 67. **Immediate or peaceful recaption.** If the loss of possession is only momentary, or if, in the case of chattels, the party makes immediate pursuit, he has the same right to use force which he had when he was defending his possession. If one recovers peaceably the possession of property to which he is entitled, he then has the right to defend his possession which was discussed in the previous section. This is true even though he obtained the possession by trick or artifice.

§ 68. **Right to use force to recover possession of chattels.** In Bobb v. Bosworth (21), the defendant attempted to take by force a slave out of the possession of the plaintiff, claiming that he was entitled to the possession; in the scuffle the plaintiff's arm was broken. The court said that while one who was entitled to the possession of chattels might retake them wherever he could find them provided the recaption could be made peaceably, the law forbade recaption to be made in a riotous or forcible man-

(21) 2 Littell (Ky.), 81.

ner, because the law in such a case more highly regards the public peace than the property right of a private individual. This represents the views of many courts in this country. But in other jurisdictions, including England, one who is entitled to the possession of a chattel may commit a battery in order to recover it from anyone who has it in his actual possession and detains it, provided that such possession was wrongful in its inception; a battery could not be committed on a bailee or upon a vendor who refuses to deliver the chattel.

The former rule is perhaps the better, though it works a hardship where the chattel is perishable or so small as to be easily concealed and the wrongful possessor is pecuniarily irresponsible. Even though one may be liable for the battery, he is not liable in trespass for the retaking of his goods. Probably there is no right to imprison in order to get back the possession of property.

§ 69. **Right to use force to recover possession of real property.** The statute of 5 Richard II (1381) provided as follows: "The king defendeth that none shall make entry on lands and tenements but in cases where entry shall be given by law; and in that case not with strong hand nor with multitude of people, but only in a peaceable and easy manner." Similar statutes forbidding forcible entry upon land are in force in nearly every jurisdiction. These statutes make forcible entry a criminal offense. The question to be discussed here is, whether the violation of the statute is also a tort. In some jurisdictions the statute is given no effect in the law of torts, so that a landlord or other person entitled to the pos-

session of land is liable only to punishment by the state if he enters by force; he is not liable in tort for the entry, for using reasonable force to eject the possessors, or for removing their goods. This seems to be the present English law. In other jurisdictions the statute forbidding forcible entry is construed as making the entry unlawful for all purposes, so that one who takes forcible possession may be compelled to restore it and also be liable in trespass to the land and to the person and goods of the possessor. A third view gives a right to recover only for the trespass to the person and goods.

To compensate taking away the right of forcible entry which existed in the early common law, the statutes provide a speedy and summary remedy for getting possession in which a sheriff or constable effects the removal. On account of the danger of the jury finding that excessive force was used—especially in landlord cases—it is much wiser in any jurisdiction to take advantage of the statutory method.

§ 70. **Right to enter another's land to recover chattels.** It is clear that one may, without incurring any liability whatever, retake his property peaceably if he can find it in a public place. The right to trespass upon another's land in order to get chattels depends upon how the chattels came to be there. The right to enter, when given, is the right to enter peaceably; the right to use force to retake chattels has already been discussed.

§ 71. **Same: Goods there by defendant's fault.** If the defendant has wrongfully left or placed the chattel upon the plaintiff's land, he has no right to enter to get it; if

the plaintiff will not give him permission and will not himself deliver it over, the defendant should bring an action of replevin. This is very old law. In a case decided in 1466 the defendant had, while trimming his hedge, allowed some thorns to fall upon the plaintiff's land adjoining; the defendant thereupon entered and removed the thorns. Since it did not appear that the defendant was not negligent, it was held that he was not excused for the trespass (22).

§ 72. **Same: Goods there by plaintiff's fault.** In Patrick v. Colerick (23) the plaintiff had wrongfully taken the defendant's straw out of his possession and had placed it on his own land; the defendant thereupon entered and retook the straw. The court held that the defendant was justified in so acting. In such a case the defendant would be liable only if he unnecessarily damaged the plaintiff's property in removing his own goods, and then only to the extent of such unnecessary damage.

§ 73. **Same: Goods there without fault of either defendant or plaintiff.** If the defendant's goods have been carried upon the plaintiff's land by a storm or other act of nature, the defendant has a right to enter to retake his property; he would, however, be liable for any damage caused to the plaintiff's property in the act of removal. If the defendant's goods have been taken by a third person and placed upon the plaintiff's land, the same rule ought to apply as in the case where they have

(22) Y. B., 6 Edw. IV, fol. 7, pl. 18.

(23) 3 M. & W., 483.

been taken there by an act of nature. Such seems to be the law where the act of the third person was felonious; but where the act was not felonious, the older cases deny the right. The reasoning is that where the act of the stranger is not felonious the defendant has at once his remedy against the stranger; and having one remedy, there is no right of self-help. Such reasoning, while quite common in the early law, is no longer considered sound; it is therefore doubtful whether the old precedents on this point would be followed today.

Section 7. Preservation of Life, Health and Property of Others.

§ 74. **Trespass upon the person to preserve the safety of the plaintiff or others.** There is no right at common law to imprison an insane person merely because he is insane; if, however, because of his insanity his own safety or that of others is endangered, he may be temporarily confined till he can be handed over to the proper authorities. A child left without protection and too young to protect himself may be taken charge of temporarily till his parents or guardian be found. If any person is in immediate danger of great bodily harm—for example, is about to be run over by a locomotive—a reasonable amount of force may lawfully be used to rescue him from the danger.

In a recent English case (24) the facts were as follows: A runaway engine was about to collide with an express train in which there were many passengers; there

(24) 21 L. T. (N. S.), 261.

was only one way to avoid it; that was to turn a switch and cause the engine to collide with an accommodation train in which there were a few passengers; this was done by the switchman. A majority of the court thought this action was excused by the great saving of life effected. It seems likely that one is justified in causing danger of great bodily harm to some persons in order to avert the danger from a much greater number of others.

§ 75. **Trespass upon land or chattels to preserve the public safety.** In Dewey v. White (25) the plaintiff sued the defendant in trespass for throwing a stack of chimneys upon the plaintiff's house. The plea was that the chimneys were a part of the house of one J. C., which house had been consumed by fire; that the chimneys being close to the highway and to other houses, and being, on account of the fire, in a dangerous state, it was necessary that they be removed; that in doing so, the plaintiff's house was unavoidably damaged. The plea was held good. Buildings may be blown up when reasonably necessary to stop the spread of a conflagration. The destruction of property in time of war is excused if done as a war measure. When a ship is in peril it is an excusable trespass to throw overboard a part or all of the cargo if reasonably necessary to save the lives of the passengers. In such a case unlike that of destroying property on land to preserve life or other property, the owner is not entirely without remedy since the loss is borne proportionately by all whose property is in danger, in-

(25) Moody & Malkin, 56.

cluding the ship, if the remainder of the property is saved. In Putnam v. Payne (26), it was held that it was lawful to kill a ferocious dog which was allowed by its owner to run at large and thus imperil the public safety.

§ 76. Right to remove chattels from danger. In Proctor v. Adams (27), the defendant had entered upon the plaintiff's land and carried away a boat belonging to one A. B.; it was shown at the trial that the boat was in danger of being carried out to sea and that they removed it for the purpose of restoring it to the owner. The entry and removal were both held excusable.

Section 8. Discipline.

§ 77. Persons possessing the right to discipline. The right to apply force to the person by way of discipline may be exercised by a parent over his children and by any one occupying a tutelary position, including guardian over his ward, master over his apprentice, master of a vessel over his mariners, and teacher over his pupils. It may also be exercised by a captain of ship over the passengers. It may not be exercised by a master over an ordinary hired servant.

§ 78. When the right may be exercised. A captain may imprison a passenger if he thinks and has reasonable grounds for thinking that a mutiny is imminent and that the imprisonment is necessary to avert it. As to whether a teacher or other person acting in loco parentis must reasonably believe that punishment is necessary or

(26) 13 Johnson (N. Y.), 312.
(27) 113 Mass., 376.

whether it is sufficient that he act in good faith there is a conflict of authority.

§ 79. **Extent of the right.** As to the amount and degree of punishment it seems that the person administering the discipline must act reasonably and not merely in good faith. He can not inflict death or great bodily harm. A teacher's authority begins when the child leaves home and continues until he returns. A pupil may be punished for an act done at home which is detrimental to the discipline of the school.

Section 9. Miscellaneous Excuses.

§ 80. **Necessity.** In Gilbert v. Stone (28) the plaintiff sued the defendant for trespass to land. The defendant pleaded that twelve armed men threatened to take his life if he would not go upon the land. The plea was held bad because the defendant had a remedy over against those that compelled him. The reasoning of the case would not now be followed; and at the present time one would probably be excused for an intentional trespass upon land in order to save his own life if he did no actual damage. Doubtless he would have to pay for any damage, as he is not excused if he takes food belonging to another to keep himself from starving.

§ 81. **Deviating from a private way.** In Taylor v. Whitehead (29) the defendant having a right of way over the plaintiff's land, deviated from the way because the way was so much covered with water that the defendant

(28) Aleyn, 35.

(29) 2 Douglass, 745.

could not use it. This was held to be no defence to the trespass upon the plaintiff's land. If the plaintiff had caused the obstruction the defendant would have been excused for deviating upon the farmer's land.

§ 82. **Deviating from a public way.** In Campbell v. Race (30) the defendant had been compelled to deviate from a public highway because of its being obstructed by snow; in so deviating he trespassed upon the plaintiff's land adjoining. The court held that such deviation was excusable if reasonably necessary; that the question of reasonable necessity was one for the jury and depended upon the various circumstances attending the case, such as the nature of the obstruction, the length of time it had existed, the vicinity and distance of other public ways and the exigency of the traveler.

§ 83. **Provocation.** Provocation—for example, calling the defendant a liar—is not a defence to a trespass; it may reduce the amount of damages which the plaintiff would otherwise be entitled to recover. See § 54 above.

§ 84. **Contributory negligence.** As will be seen later (§§ 191-200) in discussing negligence, the failure of the plaintiff to use ordinary care for his own safety generally bars him from recovery against a defendant who has negligently caused him damage. It is not, however, a defence to an intentional trespass such as assault and battery.

§ 85. **Infancy.** Contrary to the popular belief, an in-

(30) 7 Cushing (Mass.), 408.

fant or minor is liable for his trespass and other torts and his parents are not liable merely because they are his parents; they may, of course, be liable if the child was their agent or servant acting within the apparent scope of his authority (employment).

Where the liability of the infant is based upon negligence there is perhaps this difference between an infant and an adult; an infant may be held only to such care as he is capable of, while an adult under similar circumstances must do as well as the average man. Further discussion of the liability of an infant for his torts will be found in the article on Domestic Relations and Persons, §§ 133-34, later in this volume.

§ 86. **Insanity and drunkenness.** Neither insanity nor drunkenness are, generally speaking, any excuse for trespasses or other torts. The liability of one whose insanity negatives the existence of any blameworthiness is, of course, inconsistent with the modern tendency of the law of torts and has therefore been much criticised. The law is, however, too well settled to be changed except by statute. The modern custom of confining dangerous insane persons in asylums makes the question less important than formerly.

Section 10. Arrest without Warrant.

§ 87. **In general.** The importance of apprehending at once those who have committed serious crimes and of preventing the commission of such crimes is so great that arrests may under some circumstances be made without waiting to secure a warrant from a magistrate.

§ 88. **Arrest to prevent a felony.** In Handcock v. Baker (31) the plaintiff brought trespass for breaking and entering his dwelling house and beating and imprisoning him. The defendants pleaded that the plaintiff was about to kill his wife, and that they, the defendants, for the purpose of preventing this, broke into the house, arrested the plaintiff and took him and handed him over to a constable. The court held that the plea was good, thus justifying not only the arrest but the breaking into the house. If in such a case the plaintiff had not committed either a felony or breach of the peace there would have been no common law right to detain him after the danger was over.

§ 89. **Arrest for felony.** In Beckwith v. Philby (32) the plaintiff brought an action for battery and imprisonment. After a verdict was found for the defendant the court in refusing to set it aside said: "The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to sus-

(31) 2 Bosanquet v. Puller, 260.

(32) 6 Barnwall v. Cresswell, 635.

pect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities."

§ 90. **Arrest for breach of the peace.** A breach of the peace is a criminal assault and battery, or any other misdemeanor which tends to excite and alarm the public. Officers have no greater right at common law to arrest for breaches of the peace than have private citizens. They may, of course, receive the prisoner after the arrest has been made. The general rule is that one may arrest to stop a breach of the peace which is being committed in his presence or to prevent its renewal. In Regina v. Walker (33) the defendant was convicted of resisting an officer. At the trial it was shown that one Clarkson, a constable, had had an altercation with the defendant and that the defendant had struck him. Clarkson went away and returned two hours later with two other constables. They attempted to arrest the defendant, whereupon the defendant struck Clarkson and inflicted a severe wound. The court held that the conviction should be quashed, since there was no right to arrest without a warrant after the breach of the peace was over. The fact that the first assault and battery was committed upon the very person who afterward attempted to make the arrest was immaterial. If Clarkson or any one else who was a witness of the breach of the peace had arrested at once, it would have been lawful. Flight from a lawful attempt to arrest does not defeat the right, if pursuit be

(33) Dearsley, Crown Cases, 358.

made at once and continued till the arrest is effected, even though at that time the breach of the peace is over and there is no danger of renewal.

"Presence" does not require sight; it has been held that it is enough if the party arresting heard a pistol shot in the next room. In any case where an arrest is made by a private person he must with reasonable dispatch hand over his prisoner to a peace officer or bring him before a magistrate.

§ 91. **Arrests for other misdemeanors.—Statutes.** There is no right at common law to arrest without a warrant for misdemeanors other than breaches of the peace, there being no emergency sufficient to justify it. The right of officers to arrest without a warrant has been very much extended by modern legislation, especially in case of police officers of large cities.

Section 11. Justification of Officer under Judicial Process.

§ 92. **Meaning of judicial process.** Briefly, judicial process means the written authority given to the ministerial officers of a court—sheriffs or constables—authorizing them to do certain acts such as to attach property or levy upon it, or to make arrests. It is called criminal process if it is issued as incident to a criminal prosecution; if in cases other than criminal prosecutions it is called civil process. If it is issued at the beginning or during the pendency of the action, it is called mesne process; an example of this is an attachment. If it is issued at the end of the suit it is called final process; an

example of this is an execution issued upon a judgment, which authorizes the goods of the judgment debtor to be levied upon and sold to pay the judgment, or the person to be taken into custody till he pays the judgment debt.

§ 93. **Justification under valid process.** If the process is valid in every respect and the officer does as it directs, he is protected. The fact that the person whom he arrests is later acquitted of the crime for which he was arrested, or that the defendant in an attachment suit wins the suit and thus shows that there was no right to have his property attached, does not in any way invalidate the process under which the officer acted.

§ 94. **Justification under invalid process.—Process "fair on its face."** Even though the process is not valid, the officer may yet be protected. The general rule is that he is protected if the process under which he acts is fair on its face even though it be defective. In order that process be fair on its face it must be (1) issued by a court having jurisdiction of the case; (2) substantially in legal form; and, (3) contain nothing on its face which shows that it is invalid.

§ 95. **Legal form.** A warrant for arrest must contain the name of the person or, if his name is unknown, a description. A warrant without such description, with a blank for a name to be filled in by the officer, is not fair on its face. Process authorizing the seizure of property may either describe the specific property—as in the case of a replevin writ; or it may direct the sheriff to levy upon the property of a certain individual without describing it—as in the case of an execution to satisfy a judgment.

§ 96. **Jurisdiction of court.** In Chase v. Ingalls (34) an action was brought against the defendant, a deputy sheriff, for an illegal arrest. The execution upon which the plaintiff was arrested was regular in form but the magistrate who issued it was the attorney of record of the party in whose favor it was issued. It was held that since the court had jurisdiction of the case, the fact that this particular magistrate was personally disqualified did not make the arrest illegal.

§ 97. **Officer's knowledge of defect where process is fair on its face.** In Chase v. Ingalls the officer did not know of the defect and the court intimated that if he had known he would have not been protected in serving the process. Upon this point there is a conflict of authority. If information that there was a defect were always infallible and therefore equivalent to knowledge, the dictum in Chase v. Ingalls would be clearly sound; but since the information received by the officer may prove untrustworthy, it has been held in some jurisdictions that the officer may disregard the information and follow the writ. The latter seems to be the better view. In such a jurisdiction if the officer did not serve the writ and it turned out to be invalid, it seems clear that he would be protected in not serving it, but he would refuse at his peril.

§ 98. **Unconstitutional statute.** In Campbell v. Sherman (35) the plaintiff brought an action against the defendant, a sheriff, for the seizure of his steamboat. The

(34) 97 Mass., 524.
(35) 35 Wis., 103.

defendant had made the seizure under process issuing from a state court. The court held that the state statute which purported to confer jurisdiction upon the state courts in such cases was in violation of the United States Constitution and void; that the court having no jurisdiction, the process was not fair on its face and hence the officer was liable. The reasoning is logical but the difficulty is that it imposes a very heavy burden upon the officer to compel him to take the risk of doubtful questions of constitutional law. For this reason some jurisdictions while continuing to require the officer at his peril to know the jurisdiction which has been conferred upon the court whose process he serves, excuse him from the risk of statutes which give jurisdiction being later held unconstitutional.

§ 99. **Liability of officer for serving process upon the wrong person or property.** If the process is not fair on its face, the officer is clearly liable in trespass even though he follow the process. He is likewise liable if he fails to follow the process and serves it upon the wrong person or property. The fact that he made the mistake reasonably and in good faith does not excuse him. In any case where he has a reasonable doubt as to what the process authorizes, he may demand an indemnity bond from the person who is having the process served, so that if the process is bad and he has to pay damages, he may have a remedy over.

§ 100. **Right to resist an unlawful arrest.** Generally speaking ,whenever the party arrested or upon whom an attempt to arrest is made is entitled to recover in an

action of trespass against the officer, he may also resist the officer just as if the latter did not purport to act under a warrant.

§ 101. **Right to resist unlawful seizure of property.** In State v. Downer (36) the defendants were indicted for resisting an officer in the execution of his office. The defendants offered to show that the officer under an attachment against a third person was attempting to seize the goods of the defendant Downer. The court held that this evidence was properly excluded, saying: "We believe the better and safer and only practicable rule to be that wherever the question of property is so far doubtful that the creditor and officer may be supposed to act in good faith in making the attachment, the owner of the property can not justify resistance, but must yield the possession, and resort to his remedy by action. This is the only mode in which the question could be tried. And unless such a rule be adopted, no human sagacity is adequate to the decision of those nice questions which the duty of sheriffs and their officers involve. The rule here established does not impugn that which is found in the books, 'That an illegal arrest may be resisted.' If the process is void, or is misapplied, it is the same as if there were no process, so far as one's person is concerned. But the case of property is very different. It depends upon criteria which are not the objects of sense." In a few jurisdictions there is the same right to resist an un-

(36) 8 Vermont, 424.

lawful seizure of property as there is to resist an unlawful arrest. The former is the better view.

§ 102. **Justification of private citizen who aids an officer.** In Firestone v. Rice (37) the action was brought for imprisonment. The court instructed the jury that if Fenn knew that Rice was a sheriff and acted in obedience to his orders, and only upon his orders, in what he did touching the arrest, he would be justified in so doing, even though the acts of Rice were without authority. It was held that the instruction was correct; that since it was made a penal offence by statute in that state to refuse to aid an officer, it would be too heavy a burden to be compelled to stop to inquire as to the officer's authority, especially where action must be immediate.

§ 103. **Right of officer to enter dwelling-house to serve process.** While an officer may break into a dwelling-house to serve criminal process, there is no right to do this in order to serve civil process. In any case, however, where the officer is lawfully inside, he may break an inner door if reasonably necessary.

§ 104. **Officer must have warrant with him.** In Galliard v. Laxton (38) it was held that where the officers who make an arrest are known to be officers they need not in the first instance produce their warrant; but that the arrest is illegal if the officers do not have the warrant with them to produce if required.

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(37) 71 Mich., 377.

(38) 2 Best v. Smith, 363.

Section 12. Abatement of Nuisance.

§ 105. Definition of a private nuisance. Before taking up the subject of abatement of nuisances it will first be necessary to consider what a nuisance is. A private nuisance has been defined as "anything done to the hurt or annoyance of the lands of another and not amounting to a trespass". The proper form of action at common law was therefore an action on the case; the harm must be substantial, and it must be something continuous; causing mere momentary discomfort is never a nuisance. Examples of private nuisance are as follows: causing or allowing water, noxious odors, or gases to pass from the defendant's land to the plaintiff's land; polluting a stream which flows through the plaintiff's land; and damming up water so as to force it to overflow the plaintiff's land above. Further discussion of what amounts to a private nuisance will be found in the article on Rights in Land of Another in Volume IV of this work.

§ 106. Definition of a public nuisance. A public nuisance is one which is punishable by the state. It is not, however, considered a crime in the narrow sense, but a public tort, since it is not necessary that there be a criminal intent to constitute the offense. There are two kinds of public nuisances. If a private nuisance affects a considerable number of persons the nuisance becomes a public one also and punishable by indictment. The other kind of public nuisance is the obstruction of a public right, such as the obstruction of a public way.

§ 107. Private action for obstruction of a public right. The fact that a private nuisance affects so many people

that it becomes also a public nuisance does not take away the private right of action. May the obstruction of a public right ever give rise to a private right of action? In Rose v. Miles (39) the plaintiff alleged in his declaration that the defendant had obstructed a public navigable creek upon which the plaintiff was navigating his barge; and that the plaintiff was thereby compelled to convey his goods overland, thus causing him great expense. The court held that the declaration was sufficient because it showed that the plaintiff suffered a particular damage not suffered by the public generally, since he was in the act of using the creek when it was obstructed. In Winterbottom v. Lord Derby (40) the defendant had obstructed a public footway; the plaintiff, having occasion to use the way, was delayed and was put to expense in removing the obstruction. It was held that this did not entitle the plaintiff to recover because the damage was common to all who might wish, by removing the obstruction, to raise the right of the public to use the way; it was not peculiar to the plaintiff. Blocking up the principal means of ingress and egress to the plaintiff's place of business or diverting a large amount of custom from his business has been held to be peculiar damage.

§ 108. **Abating the obstruction of a public right.** It follows from Winterbottom v. Lord Derby that the right to abate the obstruction of a public right may exist even though the party abating could not succeed in a private

(39) 4 Maule v. Selwyn, 101.

(40) L. R. 2 Exchequer, 316.

action. On the other hand it is the weight of authority that the right to abate does not extend to all the public but only to those who have occasion to use the public right which has been infringed.

Where the sale of spirituous liquor has been declared a nuisance by statute, the only right to abate is that prescribed by statute; the liquor itself is not a nuisance, but merely the keeping it for sale (41).

§ 109. **Abatement of a private nuisance: Right to enter plaintiff's land.** As we have seen in § 35a, above, if the branches or roots of a tree belonging to the plaintiff encroach upon the land of the defendant, the defendant is justified in cutting them off up to the boundary line and thus disencumber his land; there is, however, probably no right to enter upon the plaintiff's land to do this unless there is actual damage suffered by the defendant. Generally speaking, any one who does suffer damage by a private nuisance may enter upon the plaintiff's land and abate it. He must, however, use ordinary care in thus removing or destroying the offending property, and if there is more than one reasonable method of abating, he must choose the one least harmful to the plaintiff. Besides, he takes chances on its being a nuisance.

§ 110. **Right to commit a breach of the peace.** The right to abate a private nuisance is never greater than the right of the public to be free from breaches of the peace. Hence if one is unable to abate the nuisance without resort to force, he should bring his common law

(41) Brown v. Perkins, 12 Gray 89.

action or ask an equity court for an injunction against its continuance; he is liable for the breach of the peace because he has a right to enter only if he can enter peaceably (42). Cases of grave emergency might prove an exception to this rule.

§ 111. **Necessity of giving notice.** In Jones v. Williams (43) the defendant pleaded to an action of trespass that the plaintiff had allowed large quantities of filth, manure, and refuse to be on his land close to the defendant's dwelling, by reason of which offensive and unwholesome smells came from the plaintiff's land into the defendant's dwelling house. The plea was held bad, Parke, Baron, saying: "It is clear that if the plaintiff himself was the original wrongdoer by placing the filth upon the locus in quo (the place in which the trespass was committed), it might be removed by the party injured, without any notice to the plaintiff; and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the plaintiff succeeded to the possession of the locus in quo afterwards, the authorities are in favor of a notice being given to him to remove, before the party aggrieved can take the law into his own hands. . . . Therefore the plea is bad as it does not state that such a notice was given or request made, or that the plaintiff was himself the wrongdoer." Lord Abinger, Chief Baron, observed that it might be necessary in some cases, where there was

(42) 3 Bl. Comm., 5.
(43) 11 M. & W., 176.

such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the court concurred.

§ 112. **Right to kill annoying animals.** In Brill v. Flagler (44) the plaintiff brought his action against the defendant for killing the plaintiff's dog. The plea stated that the dog was in the constant habit of coming on the premises and about the dwelling of the defendant, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of the mischievous propensity of the animal, and wilfully neglected to confine him, and that the defendant, unable to remove the nuisance in any other way, killed him. The court held the plea good, saying: "No other authority than the experience and observation of every man is necessary to enable him to determine that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it. It would be mockery to refer a party to his remedy by action; it is far too dilatory and impotent for the exigency of the case. . . . . The erection of a pig-sty, lime-kiln, privy, smith-forge, tobacco-mill, tallow-furnace, and the like, so near a dwelling house that the stench incommodes the family, and makes the air unwholesome, are given in the books as pertinent illustrations of the rule whereby the injured party may take the remedy into his own hands."

(44) 23 Wendell, 354.

CHAPTER IV.

CONVERSION AND TROVER.

Section 1. In General.

§ 113. Right protected and form of action. While a trespass may be committed on either real property or personal property, only personal property is the subject of conversion. The word "trespass" applies both to the act committed by the defendant and to remedy which the law gives to the plaintiff. The word "conversion", on the other hand, refers merely to the defendant's act; the plaintiff's remedy, under common law procedure, is called "trover" (from French, trouver, to find) because the action lay originally only against a finder of chattels.

§ 114. Trespass and conversion distinguished. The most important distinction between trespass and conversion is that if the plaintiff wins in trespass he gets a judgment for the damage to the chattel which the defendant has caused, the chattel remaining the property of the plaintiff, if it is still in existence; while if he wins in trover he gets judgment for the value of the chattel though it may have suffered no damage whatever. Since the defendant is thus compelled to pay the full value of the chattel, he is entitled to the property if it is still in

existence. A successful action of trover thus virtually compels the defendant to purchase the chattel converted.

§ 115. **Development of the action of trover.** Originally the action of trover lay only against one who had found lost property, had refused upon request to restore it to the owner, and had disposed of or otherwise converted it to his own use. Chiefly for procedural reasons the action was gradually extended to include other cases, until the allegations of losing, finding, and refusing to return on request became wholly fictitious, and were neither proved by plaintiff nor denied by defendant. In consequence, many cases where an owner's rights in a chattel have been substantially interfered with may now be redressed by the action of trover. The word "conversion" or the phrase "conversion to his own use" meant originally that the defendant had received the benefit of the property. It has long been settled, however, that it is not necessary that the defendant be benefited or intend to receive any benefit (1). The deprivation of the plaintiff rather than the benefit to the defendant is now the gist of the action.

SECTION 2. ESSENTIALS OF CONVERSION: PHYSICAL ACT.

§ 116. **Convertor must be in possession or control of chattel.** No conversion can be committed save by a person in possession or control of the chattel converted, or one who has authorized such possession or control. The

(1) Keyworth v. Hill, 3 B. & Ald. 685.

possession need not be manual, but the control must be effective physically. In Traylor v. Horral (2), the plaintiff had corn in a crib on the land of one Kinman. One Capehart there offered the corn at public sale and the defendant bid it off. The plaintiff was present and forbade any one to remove the corn. It was not shown that any one attempted to take possession of it or to remove it or to prevent the plaintiff from removing it. It was held that this did not amount to a conversion.

§ 117. Mere omission is not a conversion. With one exception to be mentioned below (§§ 132-33) a conversion can be effected only by an affirmative act. Mere nonfeasance (doing nothing) will not be sufficient, although it may give plaintiff some other cause of action. In Farrar v. Rollins (3) the plaintiff claimed that he had loaned defendant a sled, that he had requested the defendant to return the sled to the plaintiff's house and that the defendant had refused to do it. There was nothing to show that the defendant refused to let the plaintiff come and get the sled. The court held that this was no conversion; even if the defendant had contracted to return it to the plaintiff's house, it would be merely a breach of contract, and not a conversion.

§ 118. Defendant's act must be intentional. In Mulgrave v. Ogden (4) plaintiff alleged that the defendant so

(2) 4 Blackf. (Ind.), 317.
(3) 37 Vt., 395.
(4) Croke, Eliz. 219.

negligently kept some butter of plaintiff's that he had found, that it became of little value. The court held that this could not be a conversion. If plaintiff's goods are stolen or lost out of the possession of a carrier or wharfinger, the carrier or wharfinger is not liable for conversion, even though the loss was due to his negligence (5). The act or detention relied upon as a conversion must be intended by the wrongdoer.

§ 119. **Conversion a tort to chattel property only.** Real property is not the subject of conversion. Wrongs to this must be redressed by actions of trespass or ejectment, though when parts of the realty have been severed, as trees or coal, and thus turned into personal property they may then be converted. Anything not regarded as property at all, or dealt with as such, is not converted. In Nelson v. Whetmore (6) the action was to recover the value of a slave. The slave had run away from the plaintiff and had represented himself to the defendant, who was travelling from the South to his home in New York, as a free mulatto, and asked him to take him as a servant for the sake of cheapness. The defendant acceded to this request and the slave travelled with him as far as Washington, where he disappeared. The court held that if the defendant did not know that the mulatto was a slave he was not liable in trover, since merely taking him as a servant was not an assertion of property in him.

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(5) Wamsley v. Atlas S. S. Co., 168 N. Y. 533.

(6) 1 Richardson (S. C.), 318.

SECTION 3. ESSENTIALS OF CONVERSION: INTENT.

§ 120. The intent necessary in conversion. Act of dominion. The original idea of conversion was that the defendant received the benefit of the property, and consequently that the plaintiff was deprived of it. It is well settled now that the defendant need not receive any benefit; nor is it essential that the plaintiff be actually deprived, since the defendant cannot, after conversion, compel the plaintiff to receive back the property in satisfaction of the tort (§ 137, below). Trover has been allowed in many cases where there has not been even an intent to deprive the plaintiff of his property. For the sake of clearness these cases will be discussed by themselves in Section 4, §§ 134-35, below.

Conversion is frequently spoken of as an "act of dominion." This phrase has never been satisfactorily defined and its use has probably helped to bring about much confusion on the subject. Baron Bramwell remarked in Burroughs v. Bayne (6a) that "after all, no one can undertake to define what a conversion is." The use of the phrase is avoided in this chapter for the sake of clearness.

§ 121. Intent to deprive generally necessary. Generally speaking, the intent to deprive the plaintiff of his property is still essential. A merely momentary interference with property, not under a claim to it, nor with the design of depriving the owner of it, will not consti-

(6a) 5 H. & N. 296.

tute a conversion. In Fouldes v. Willoughby (7) the defendant was the manager of a ferry; the plaintiff had embarked on board the defendant's ferry boat, having with him two horses; the defendant, on the alleged ground that the plaintiff had misconducted himself, told the plaintiff to go ashore with his horses; upon the plaintiff's refusal the defendant took the horses ashore and turned them loose. The court held that if this was done merely for the purpose of inducing the plaintiff to go on shore it was not a conversion and the plaintiff's sole remedy was in trespass.

§ 122. **Acts proper for a finder or custodian.** In Hollins v. Fowler (8) Lord Blackburn laid down the following rule which has been considered since as representing the law: "One who deals with goods at the request of the person who has the actual custody of them, in the bona fide belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody." Under this rule a packer who in good faith packs goods for one who is in unlawful possession of them and returns them still acting in good faith, is not liable for conversion. The rule would also cover the case of a carter removing furniture, a blacksmith shoeing a horse, and so on. The effect of the rule is thus to require an intent

(7) 8 M. & W., 540.
(8) L. R. 7 H. L. 757.

to deprive the owner in all cases where the act done is such as a finder or bailee could lawfully do.

§ 123. **Proof of intent to deprive.** The intent to deprive may be shown from the language used by the defendant; it is more usually implied from circumstances. The circumstances may be such that the implication is a necessary one, as, for example, in the case of destruction or purported dealing with title.

§ 124. **Destruction or essential change in the nature or quality of a chattel.** It is well settled that trover will lie for the intentional destruction of a chattel. It also lies where the chattel has been so dealt with that its identity is lost. Thus in Dench v. Walker (9) it was held that adulterating rum so as to lessen greatly its quality and value was a conversion. A slight adulteration, on the other hand, would make the defendant liable only for the damage done. In Simmons v. Lillystone (10) the defendant had sawed into pieces timbers which were to be used for making bowsprits. The court said: "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use. In this case nothing is done but cutting the timber, and, by acci-

(9) 14 Mass., 500.
(10) 8 Exchequer, 481.

dent, it is washed away by the river—not purposely thrown by the defendant to be washed away; consequently we think that does not amount to a conversion."

An injury to a chattel, not changing its nature, is thus not a conversion.

§ 125. **Purported transfer of legal interest in chattel: Transferor.** In Powell v. Sadler (11) the defendant delivered upon a purported sale, a horse belonging to the plaintiff, not having authority to make the sale. This was held to be a conversion. It is likewise a conversion if one without authority delivers the property of another upon a purported mortgage or pledge.

§ 126. **Same: Transferee.** In Galvin v. Bacon (12) the plaintiff had loaned one Staples a horse for a short time. Staples, without authority, purported to sell the horse to one Scott, who in turn purported to sell him to one McAllister, who purported to sell him to the defendant. The horse was delivered upon each purported sale. The court held that the defendant was liable in trover though he had bought in good faith and had paid value. Each purchaser was liable, though a recovery against any one would bar suit against the rest. The defendant would have been equally liable in trover if instead of receiving the property upon a purported purchase he had received it upon a purported mortgage or pledge.

§ 127. **Same: Agent and intermediaries.** In Parker v.

(11) Paley, Principal and Agent, (3 ed.) 80.

(12) 11 Maine, 28.

Godin (13) trover was brought by the assignees in bankruptcy of one Satur. After the bankruptcy, the defendant, as a friend of the bankrupt's wife, pawned some plate which had belonged to her husband, and handed over the money thus received to her. The defendant was held liable.

In Perkins v. Smith (14) one Hughes had become bankrupt; defendant, who was a servant of one Garraway, went to the bankrupt's shop to collect a bill owing to his master; the bankrupt gave him some property which he sold for his master's use. The defendant was held liable in trover, the court saying, "the act of selling the goods is the conversion, and whether to the use of himself or another it makes no difference."

In Stephens v. Elwall (15) the defendant acting as servant for one Heathcote had bought goods of one Deane who had bought them of certain bankrupts after their bankruptcy. The court held that the defendant was liable though he acted in good faith and by the authority of his master.

§ 128. **Same: Levy upon goods under judicial process.** In Johnson v. Farr (16) trover was brought for last blocks. The defendant had attached the blocks as the property of one Howe on a writ in favor of one Barron against said Howe. It was held that this amounted to a

(13) 2 Strange, 813.
(14) 1 Wilson, 328.
(15) 4 Maule v. Sel, 259.
(16) 60 N. H., 426.

conversion. Trover thus lies for a wrongful levy by which a lien or other legal interest is claimed in the goods.

§ 129. **Liability of fraudulent purchaser after rescission of sale.** In Thurston v. Blanchard (17) the defendant had induced the plaintiff by fraud to sell him some property, giving his negotiable note in payment. The court held that the plaintiff, upon discovery of the fraud, was entitled to rescind the sale and recover against the defendant in trover. The reasoning appears to be this: The sale, being fraudulent, could be rescinded by plaintiff upon discovery of the fraud, if he chose to do so. Upon rescission, title to the property at once revested in plaintiff, and defendant then was in the position of one claiming to exercise the right of an owner over property no longer his. This right to rescind the sale and bring trover exists as against the fraudulent vendee or anyone who should buy from him with notice of the fraud; it would be cut off by a transfer of the property to one who pays value without notice of the fraud. For discussion of this see the article on Sales, § 76, in Volume III of this work.

§ 130. **Wrongful use of property.** If the property used by the defendant is of such a nature that its use results in destruction, then it is obviously conversion by destruction. Where the use does not result in destruction the defendant is still liable in trover, of course, if the intent

(17) 22 Pick. (Mass.), 18.

to deprive is shown. It has been stated in dicta in some cases that any use is a conversion, but it is at least doubtful whether this would be so held. In Frome v. Dennis (18) the plaintiff had left his plow on the farm of one Cummins, with the consent of the latter. The following year the farm passed into the possession of one Hibler. Shortly afterwards the defendant, a neighboring farmer, borrowed the plow of Hibler supposing it was Hibler's and after using it three days returned it. The court held that the defendant was not liable in trover "since neither the use nor the surrender indicated any repudiation of the plaintiff's right."

Liability for an accidental loss of property while one is wrongfully using it is considered in §§ 134-35, below.

§ 131. **Preventing removal of goods.** Preventing a removal is not necessarily conversion. In England v. Cowley (19) the plaintiff having a mortgage upon the household furniture of one Miss Morley, upon default of Miss Morley put a man in possession and sent two men with vans to get the furniture. The defendant, landlord of Miss Morley, wished to distrain the furniture for rent; it being after sunset, he could not legally do this till the next morning. He refused to allow removal; he stationed a policeman near, but did not attempt to take possession; the next morning he distrained the goods. It was held that the defendant was not liable in trover.

If, however, removal is prevented for a considerable

(18) 45 N. J. L., 515.
(19) 8 Exch., 126.

time, defendant being also in effective physical control of the property, it will be a conversion. In Bristol v. Burt (20) trover was brought for some potashes. The defendant was the collector of the port at Oswego. He refused to allow the plaintiff to remove the potashes from the port for several months, stationing armed men to prevent their removal. The only excuse he offered was that he suspected that if the plaintiff took the property to Sackett's Harbor as he intended, the collector of the port at that place would not do his duty and that the ashes would be sent from thence to a British port. The defendant was held liable.

§ 132. **Detention of possession.—Qualified detention.** A refusal to deliver on demand or to allow plaintiff to take his property is a conversion unless adequately excused. Requiring reasonable proof of plaintiff's claim or an opportunity to investigate it is a good excuse. In Alexander v. Southey (21) plaintiff demanded the goods of the defendant, a servant of the one in possession; the defendant refused to deliver up the property without an order from his master. The court held that the defendant was not liable in trover, Best, J., saying: "An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is whether it is a reasonable one. Here the jury thought the qualification a reasonable one and that the refusal did not amount to a conversion of the

(20) 7 Johnson, 254.

(21) 5 Barnwall v. Alderson, 247.

property, and I think they were right in that conclusion."

In Green v. Dunn (22) trover was brought for timber which defendant had found on his premises. The plaintiff demanding it of the defendant, the latter said, "If you will bring any one to prove it is your property, I will give it you and not else." This was held to be a reasonable qualification and therefore the defendant was not liable.

§ 133. **Same: Property must be in possession of defendant at time of refusal.** Unless the property is in the possession of the defendant at the time of refusal, there can of course be no act of detention and therefore no conversion. In Smith v. Young (23) the plaintiff brought trover for a lease and relied upon demand and refusal. It appeared that the lease was in the hands of the defendant's attorney at the time of the refusal. The court said: "The defendant would have been guilty of a conversion if it had been in his power; but the intention is not enough. There must be an actual tort. To make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or detain the article demanded."

Section 4. Exceptional Cases. Accidental Loss by Intermeddler.

§ 134. **Scope of section. Wrongful transfer of possession.** The cases discussed in this section are those where trover has been allowed where there was not or

(22) 3 Campbell, 215.

(23) 1 Campbell, 439.

may not have been any intent to deprive the plaintiff of his property.

In Youl v. Harbottle (24) the defendant, a carrier, delivered by mistake the plaintiff's goods to another person. The defendant was held liable in trover. Devereux v. Barclay (25) held that a warehouseman was also liable in trover for misdelivery. These cases have been criticised, but since carriers and warehousemen are liable at any rate in an action on the case founded upon their public duty to deliver the goods to the consignee at their peril, the form of action is not very important. In Hiort v. Bott (26) one Grimmett, plaintiff's broker, fraudulently sent an order to the plaintiff for barley, purporting to come from the defendant; the plaintiff consigned the barley to the defendant and sent the defendant the bill of lading. Grimmett called on the defendant and told him it was the plaintiff's mistake, and asked the defendant to indorse the order to him in order to avoid the expense of sending it back. The defendant did so; Grimmett obtained delivery of the barley, disposed of it and absconded. The jury found that the defendant was merely anxious to correct what he believed to be an error, with a view of restoring the barley to the plaintiff. The court held that the defendant should be held liable for the value of the barley, Bramwell, B., saying: "This is an action for conversion, and I lament that such a word should appear

(24) 1 Peake, 49.

(25) 2 Barnwall v. Alderson, 702.

(26) L. R., 9 Exch., 86.

in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a non-artificial system of pleading, thus: 'We, the plaintiffs, had at the London and Northwestern Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing with it. Nevertheless, you ordered the London and Northwestern Railway Company to deliver it, without any authority, to Grimmett, who took it away.' Would not that have been a logical and precise statement of a tortious act on the part of the defendant, causing loss to the plaintiffs? It seems to me that it would."

Similarly an innocent misdelivery by a finder to the wrong person as owner has been said to be a conversion (27).

§ 135. **Misuse by bailee.** In Wentworth v. McDuffie (28) the court held that if the defendant wilfully drove a hired horse at a rate of speed so immoderate as seriously to endanger her life, and he was at the same time aware of the danger, and her death was caused thereby, it would be such a tortious act as would amount to a conversion; though it would be otherwise if the fast driving was the result of mere negligence and want of discretion,

(27) Isaack v. Clark, 2 Bulstrode, 306, 312.

(28) 48 N. H., 402.

he not being aware that it endangered the safety or life of the mare. In Perham v. Coney (29) the defendant hired a horse and carriage of the plaintiff to drive to Lynnfield and back. After reaching Lynnfield the defendant drove on several miles further to Peabody where the horse was injured. The court held that "whether or not such injury was caused by any want of ordinary care and skill of the defendant in driving the horse and carriage from Lynnfield to Peabody, or in tying or managing the horse in Peabody, or by any insufficiency of the harness of said horse, or any physical infirmity, or want of docility of the horse, would be immaterial, as the defendant's use of the horse and carriage, in driving beyond Lynnfield in violation of his contract, was a conversion of such horse and carriage."

In almost all of this class of cases where the defendant has been held liable, the property has been practically destroyed; even if trover had not been extended to cover these cases, the defendant would probably have been liable in an action on the case for such accidental loss occurring while the defendant was intentionally intermeddling with the property.

Where the wrongful use is innocent, the bailee is not liable for accidental loss, at least if such use was for a short time only. In Spooner v. Manchester (30) the defendant had hired a horse and buggy to go from Worcester to Clinton and back. By mistake he took the wrong

(29) 117 Mass., 102.
(30) 133 Mass., 270.

road on his return; when he discovered the error, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough. On the way back the horse was accidentally injured. The court said: "There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion."

Where the intentional intermeddling—i. e., the extra drive—was over, and the defendant was again acting within the terms of the bailment when the loss occurred, it was held in Farkas v. Powell (31) that the defendant was not liable unless the extra drive caused the loss of the horse.

Section 5. Excusable Conversion.

§ 136. Conversion by destruction or sale excused in emergencies. Even though all elements of a conversion are present, the defendant may yet not be liable. In Bird v. Astick (32) the defendant, a bargeman, was held excused for throwing plaintiff's goods overboard in a storm in order to save the lives of the passengers on the barge. In Perkins v. Ladd (33) the defendant was held to be ex-

(31) 86 Ga., 800.
(32) 2 Bulstrode, 280.
(33) 114 Mass., 420.

cused for selling without authority some perishable property which had belonged to a deceased soldier.

§ 136a. **Mistake caused by plaintiff.** In Waring v. Pennsylvania R. R. Co. (34) trover was brought for some oil. At the trial the defendant offered to prove that if he received the oil it was by a delivery from the plaintiff's agents and if there was an error it was an error produced by the plaintiff's agents. The court held that the evidence should have been admitted; that if the error was the plaintiff's, the defendant was not liable unless he knowingly took advantage of it.

§ 137. **Effect of return of property after conversion.** It is well settled that a return of the property does not cure the tort, unless the plaintiff should voluntarily receive it back in full satisfaction of his claim. If, in the absence of such an agreement, he receives back the property, it goes in mitigation of damages. As to whether an unaccepted tender of the goods to the plaintiff will mitigate damages, there is difference of judicial opinion: in England (35), it does; in this country generally (36), it does not.

Section 6. Remedies Concurrent with Trover.

§ 137a. **Other remedies.** Wherever the conversion involves a taking from the plaintiff's possession the plaintiff may sue in trespass, if he prefers. Wherever the defendant has the converted property in his possession, and

(34) 76 Pa., 491.

(35) Earle v. Holderness, 4 Bingham, 462.

(36) Carpenter v. Manhattan Life Ins. Co., 22 Hun 47.

the plaintiff desires to have it back, he may get it back in an action of replevin. Where the defendant has received a benefit from the converted property, the plaintiff may sue in indebitatus assumpsit for this unjust enrichment. The measure of recovery is not the value of the chattel, but the amount of benefit thus received by the defendant. Where the defendant has induced the plaintiff by fraud to part with his property, the plaintiff may bring an action on the case for the fraud or deceit instead of an action of trover.

The above matters are discussed in Chapters II and V of this article, and in the articles on Common Law Pleading in Volume XI, and Quasi Contracts in Volume I of this work.

CHAPTER V.

DECEIT.

Section 1. In General.

§ 138. **Essentials of deceit.** An action for deceit or fraud is one of the large family of actions on the case. Inducing a person to part with his property upon credit by falsely representing that one has a large amount of property, or inducing a person to buy property by falsely representing it to have certain qualities are common examples of deceit.

In order to make out a case of deceit the plaintiff must allege and prove the following essentials:

1. That the defendant made a representation to the plaintiff.

2. That the representation was not true in fact.

3. That the defendant did not believe that it was true in fact.

4. That the representation was made with intent that the plaintiff act upon it.

5. That the plaintiff acted in reliance upon the representation and was damaged by such action.

These essentials will be discussed in the following sections.

SECTION 2. DEFENDANT'S REPRESENTATION.

§ 139. Representation distinguished from a promise. An action of deceit will not lie for a mere breach of promise to do something in the future. In Long v. Woodman (1) the plaintiff alleged that the defendant induced the plaintiff to convey certain real estate by lending to the plaintiff $236 and by promising to give him a bond to reconvey in two years, upon re-payment; that later the defendant refused to execute the bond and that he refused to reconvey the property upon tender of the amount borrowed with interest. It was held that this was not a representation as to a present fact but a mere breach of contract, and therefore an action for deceit would not lie.

§ 139a. Representation of opinion. The difference between fact and opinion is shortly this: Fact is generally a matter of sensation in which persons usually agree; while opinion is a matter of judgment in which persons are likely to differ. If, instead of stating a thing to be a fact, one merely purports to give his opinion, he is not liable in deceit, unless he lies as to what his opinion is. In Pasley v. Freeman (2) it was alleged that the defendant, intending to deceive the plaintiff, falsely represented to the plaintiff that one Falch was a person safely to be trusted, whereupon the plaintiff sold to said Falch upon credit; that said Falch was not a person safely to be trusted, which the defendant knew. The court held that

(1) 58 Maine, 49.

(2) 3 Term Reports, 51.

while the defendant did not need to give any opinion as to Falch's credit, yet if he chose to give one he was entitled to protection only if he gave his honest opinion.

In Smith v. Land Corporation (3) the vendors of property represented to the vendee that the property was let to a most desirable tenant. It appeared that the tenant had paid his last quarter's rent to the plaintiff by driblets under pressure. Bowen, L. J., said: "If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion . . . The vendors state that the property is let to a most desirable tenant; what does that mean? I agree that it is not a guarantee that the tenant will go on paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between landlord and tenant which can be considered to make the tenant an unsatisfactory one . . . . In my opinion a tenant who has paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant."

§ 140. **Representation of intention.** The state of one's intention as well as the state of one's opinion is a matter of fact. Hence, one may be liable in deceit for lying as to his intention. In Edgington v. Fitzmaurice (4) the directors of a corporation had represented in a prospectus that a certain loan which was

(3) L. R. 28 Ch. Div. at page 16.

(4) L. R. 29 Ch. Div. 459.

asked for was to be used for improvements; it was shown that the defendants used the money to pay off pressing liabilities and had so intended to use it when they issued the prospectus. It was held that the defendants were liable in deceit, Bowen, L. J., saying: "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

It would seem to follow from this that if one at the time of buying property on credit expressly or impliedly represented that he intended to pay for it but in fact he intended at the time never to pay, he would be liable in an action for deceit. Upon this point, however, there are only a few cases and they are not harmonious (5). The question is not very important since it seems to be settled that the vendor may rescind the sale and bring trover for the value of the property, or replevin for the property itself. It is, of course, necessary that the intent never to pay be formed at the time of sale; if formed afterward, it could have no influence in making the sale.

Section 3. Representation Untrue in Fact.

§ 140a. Suppressing part of the truth. Even though everything the defendant says is true, he may yet be liable in deceit. In Kidney v. Stoddard (6) the defendant

(5) The action was allowed in McCready v. Philips, 56 Neb. 446; it was denied in Farris v. Strong, 24 Col. 107.

(6) 7 Metcalf (Mass.), 252.

wrote to the plaintiff a letter of recommendation of the defendant's son, asking the plaintiff to give him credit and assuring the plaintiff that his contracts would be punctually attended to. The plaintiff furnished goods to the son for which the latter did not pay. It appeared that the son was a minor at the time the goods were furnished. The court held that when a party intentionally conceals a material fact, in giving a letter of recommendation, it amounts to a false representation; that the defendant, giving a letter in this case to an unlimited amount, was bound to communicate every material fact; that if he concealed the fact that the son was a minor, with the view to give him a credit, knowing or believing that he would not get a credit if that fact was known, it was a fraud, and the plaintiff was entitled to recover.

The test in such cases seems to be this: Is the concealment such that the withholding of that which is not stated makes that which is stated false? Even though there be no duty to say anything, if one undertakes to make a statement, he is under a duty to tell the whole truth. In Newell v. Randall (7) the defendant stated to the plaintiff that he had $3,300 invested in business. It was couched in language calculated to negative the idea that this was merely the gross amount of his assets, and that he owed debts to the extent of two-thirds or the whole of that amount. It was held that concealment of this kind, under the circumstances, amounted to a false representation.

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(7) 32 Minn., 172.

SECTION 4. DEFENDANT'S DISBELIEF IN REPRESENTATION.

§ 141. **Positive belief an excuse.** If the defendant has a positive belief in the truth of the representation, he can not be held liable in deceit. In Mahurin v. Harding (8) the plaintiff sued the defendants for representing that a mare which they traded to the plaintiff was well, good and sound with the exception of a slight touch of the heaves, when as a matter of fact the mare had glanders and was good-for-nothing. The court held that if the defendants made this statement in entire good faith, fully believing it to be true, they were not liable in deceit.

§ 141a. **Representation made without belief.** Positive knowledge that the representation is false is not essential to make the defendant liable in deceit; it is sufficient if the defendant had no belief in its truth—that is, if he made it recklessly without caring whether it was true or false (9).

§ 142. **Representation of belief as knowledge.** Where accurate knowledge as distinguished from mere opinion is possible, the defendant may be held liable in deceit for representing his belief as knowledge. In Cabot v. Christie (10) the defendant stated to the plaintiff that of his own knowledge the farm which he afterward sold him contained at least 130 acres; in fact, there were only 117. It was held that it was no defence that the defendant honestly believed that there were 130 acres, because he had represented his belief as knowledge, and the quantity of

(8) 28 New Hampshire, 128.

(9) Derry v. Peek, 14 App. Cases, 337 at 368.

(10) 42 Vermont, 121.

land in a farm was a matter upon which accurate or approximately accurate knowledge was not at all impossible or unusual.

On the other hand, if the subject matter of the representation is such that accurate knowledge is impossible or very difficult to obtain, a representation that he had knowledge is not actionable if the defendant honestly believed the statement to be true. In Haycraft v. Creasy (11) the defendant had made the following representation to the son and agent of the plaintiff: "Your father may credit Miss Robertson with perfect safety; for I know of my own knowledge that she has been left a considerable fortune lately by her mother, and that she is in daily expectation of a much greater at the death of her grandfather, who has been bedridden a considerable time." It was held that the defendant was not liable, Grose, J., saying: "It is true that he asserted his own knowledge upon the subject; but consider what the subject matter was of which that knowledge was predicated: it was concerning the credit of another, which is a matter of opinion. When he used these words, therefore, it is plain that he only meant to convey his strong belief of her credit, founded upon the means he had of forming such an opinion and belief . . . And taking the whole together, I think the evidence goes no further than his asserting that, to his firm belief and conviction, she was deserving of credit; and that the defendant was himself a dupe to appearances."

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(11) 2 East, 92.

Section 5. Defendant's Intent that Plaintiff Act upon Representation.

§ 142a. Intended benefit to defendant not essential. Pasley v. Freeman (12) in 1789 was the first case to hold that it was not essential that the defendant be a party to a contract with the plaintiff or that he receive any benefit from the deceit. It is equally unnecessary that the defendant be actuated by any motive of gain for himself. In Foster v. Charles (13) the defendant had recommended one Jacque to the plaintiff as an excellent young man and worthy of credit; it was apparent that the defendant did not expect to profit by the plaintiff's acting on the representation. The court held that a sordid regard to self interest was not necessary; "if a person tells a falsehood, the natural and obvious consequence of which, if acted upon, is injury to another, that is fraud in law."

In Polhill v. Walter (14) the defendant, in order to avoid—as he thought—inconvenience, signed without authority the name of one Hancorne as acceptor to a bill of exchange, being assured by the payee that the bill was regular and that Hancorne, who was temporarily absent, would ratify the act upon his return. The bill came into the hands of the plaintiff who bought it supposing that it had been accepted by Hancorne. Hancorne did not ratify the defendant's act and repudiated the bill. The defendant was held liable in deceit to the plaintiff though

(12) 3 Term Reports, 51.
(13) 7 Bingham, 105.
(14) 3 Barnwall v. Adolphus, 114.

his only motive was to save trouble and delay in getting the bill accepted.

§ 143. Representation need not be made to plaintiff in person. In the case just discussed the representation was not made to the plaintiff in person; it was made to a class of persons of whom the plaintiff was one, namely, all to whom the bill might be offered in the course of circulation. In Bedford v. Bagshaw (15) the defendant as director in a mining company obtained the insertion of the name of the company upon the official list of the stock exchange by falsely representing that two-thirds of the script had been paid in full; the plaintiff, knowing the rules of the exchange and relying upon the insertion of the name of the company upon the list, bought two hundred shares which turned out to be worthless. The defendant was held liable because the plaintiff was one of the persons to whom the defendant contemplated that the representation would be made.

Where there is no intent that a representation be communicated to the plaintiff, the defendant is not liable. In Hunnewell v. Duxbury (16) the defendants as directors of a corporation made a false representation in a certificate filed with the commissioner of corporations, stating that the amount of the capital stock had been paid in; the plaintiff, relying upon the statement, bought notes of the corporation. The court held that the defendant was not liable, saying: "In the case at bar, the certificate was made and filed for the definite purpose, not of influencing

(15) 4 Hurlstone & Norman, 538.
(16) 154 Mass., 286.

the public, but of obtaining from the state a specific right, [to do business within the state] which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes."

Section 6. Plaintiff's Reliance upon Representation. Damage Therefrom.

§ 143a. Necessity of plaintiff's reliance and damage. If the plaintiff did not act in reliance upon the defendant's representation the defendant would not be liable, because he could hardly be said to have caused the plaintiff's damage. As in most actions on the case, the plaintiff must prove that he suffered special damage; merely being deceived is not enough.

In Nye v. Merriam (17) the plaintiff sued the defendant for deceit in weighing butter sold by the defendant to the plaintiff. There was evidence tending to show that at the time the plaintiff gave his note for the purchase price, there was nothing said about false weighing. The court said: "If the plaintiff did not recollect the false statement—did not know and could not tell what the balance due for the butter was, according to the original falsehood, nor what the figures were which indicated the false

(17) 35 Vermont, 438.

weight, but claimed a balance sufficient to cover the whole and true weight, and received it on settlement, we are at a loss to see how he can claim to have been defrauded."

§ 144. **Representation need not be predominant cause of plaintiff's action.** In Matthews v. Bliss (18) the plaintiff alleged that the defendant had fraudulently induced the plaintiff's agent to sell and convey the plaintiff's property to him for much less than its true value. The trial court instructed the jury that it was not necessary that the representation be the sole inducement of the sale, but it must have been a predominant one. The appeal court held that this instruction was erroneous; that if the deceit was any material part of the cause of the plaintiff's action, it was sufficient.

§ 145. **Kind of damage suffered by the plaintiff.** In most of the cases of deceit the plaintiff is damaged by the loss of property. In a few cases, however, the plaintiff has been damaged by suffering personal injuries. In Langridge v. Levy (19) the defendant sold to the father of the plaintiff a gun, fraudulently representing that it had been made by Nock and that it was a good, safe, and secure gun. When the plaintiff used the gun it exploded and mutilated his left hand so severely that it had to be amputated. It was shown that the defendant knew that the plaintiff was to use the gun. The defendant was held liable.

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(18) 22 Pickering, 48.

(19) 2 Meeson v. Welsby, 519.

Section 7. Must Plaintiff Be Diligent to Detect the Falsehood?

§ 146. General rule and exceptions.—Parties not on an equal footing. It is frequently stated that if the plaintiff fails to use the means at his command to detect the falsehood, he is barred from recovering for the deceit. The doctrine has been criticised on two grounds: that it is illogical to allow what is practically contributory negligence to be a defence to an intentional tort; and that it ought to be the policy of the law to protect the weak and credulous. As will appear in the following case, however, the rule is subject to two such important exceptions as to make its application narrow. In Cottrill v. Krum (20) the trial court charged the jury as follows: "If you find from the evidence that the plaintiff, by diligent inquiry, might have ascertained the truth or falsity of the alleged representation, and failed to make such investigation, then the court instructs you that he cannot recover in this action." The upper court held that the charge was incorrect where the parties were not on an equal footing, i. e., did not have equal opportunities for acquiring information, or where the effect of the defendant's representation was to throw the plaintiff off his guard. In Cottrill v. Krum the plaintiff, a stranger to the enterprise whose stock was the subject of sale, was not on an equal footing with the defendant, who was the originator and promoter of the enterprise and as its business man-

(20) 100 Missouri, 397.

ager was fully conversant with its past history and present condition.

§ 147. **Throwing plaintiff off his guard.** In Starkweather v. Benjamin (21) action was brought to recover damages arising from alleged misrepresentations made by the defendant concerning the quantity of land in a parcel which he sold to the plaintiff. The defence rested mainly on the ground that the purchaser saw the land and was as able to judge of its size as the seller. The court said: "We do not think the doctrine, that where both parties have equal means of judging there is no fraud, applies to such a case. The maxim is equally valid, that one who dissuades another from inquiry and deceives him to his prejudice is responsible. It cannot be generally true that persons can judge of the contents of a parcel of land by the eye. When any approach to accuracy is needed, there must be measurement. When a positive assurance of the area of a parcel of land is made by the vendor to the vendee with the design of making the vendee believe it, that assurance is very material, and equivalent to an assurance of measurement. In this case the testimony goes very far, and shows that the assertions and representations, which the jury must have found to be true, were of such a nature that if believed, as they were, a re-survey must have been an idle ceremony. They were calculated to deceive, and as the jury have found, they did deceive Benjamin, and he had a clear right of action for the fraud."

§ 148. **Diligence required of plaintiff.** In Savage v.

(21) 32 Michigan, 305.

Stevens (22) the plaintiff sued for alleged false representations made by the defendant in order to induce the plaintiff to exchange an estate in Boston for an estate in Tamworth, New Hampshire. The defence set up was that the plaintiff could have ascertained the truth by visiting the New Hampshire estate. The court said: "It is true that a person to whom such representations are made has no right to rely upon them, if the facts are within his observation, or if he has equal means of knowing the truth. But if the facts are not known to him, and he has not equal means of knowing the truth, and can rely upon the statements made to him without imputation of negligence, then, upon discovering them to be false and fraudulent, he may maintain an action. In the case at bar, the farm respecting which the representations were made was situated in Tamworth, New Hampshire, far distant from the place of the bargain. No certain knowlege could be obtained by the plaintiff respecting it, except by visiting the estate. Negligence cannot be imputed to the plaintiff, as a matter of law, in failing to visit a place so distant; and whether he was negligent, in fact, in not doing so was a question for the jury upon all the evidence in the case."

In Roberts v. French (23), where the representation was as to the area and length of boundaries of a lot made in an auction sale, the court held that since it was out of the question for the bidder to go and verify the statement before he made his bid, the purchaser had a right to rely upon the representation.

(22) 126 Mass., 207.

(23) 153 Mass., 60.

SECTION 8. NON-ACTIONABLE REPRESENTATIONS.

§ 149. **Representations of intention as to price.** Where parties stand in the relation of vendor and purchaser, some representations are regarded as not being actionable though all the essentials of deceit are present. If a vendor should falsely represent that he did not intend to take less than a certain price, or a purchaser that he did not intend to give more than a certain price, such representations would not be actionable though made with intent to deceive (24).

§ 150. **"Puffing": Representations of value.** So, certain representations made by a vendor by way of puffing his wares fall within the non-actionable class. In Harvey v. Young (25) the defendant, to induce the plaintiff to buy an interest in some property, fraudulently represented that the interest was worth £150. The plaintiff paid him £150 for it but could not resell it for £100. The court held that this did not make out a case of deceit, saying, "it was the plaintiff's folly to give credit to such an assertion."

In Deming v. Darling (26), the defendant, to induce the plaintiff to buy a bond which was secured by a railroad mortgage, had represented that the bond was of the very best and safest, an A No. 1 bond, and that the mortgage was good security for it. The court held that the representations were not actionable, saying: "It is settled that the law does not exact good faith from a seller

(24) Vernon v. Keyes, 12 East, 632.
(25) Yelverton, 21a.
(26) 148 Mass., 504.

in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which it has always been 'understood, the world over, that such statements are to be distrusted' . . . If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith . . . The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed."

§ 151. **"Puffing": Representations other than value.** In Gordon v. Parmelee (27) the vendee of certain premises contended that the vendors had pointed out false boundaries, and that they had represented that the farm was of a soil and a capacity for productiveness and the keeping of stock greatly superior to what it was in fact. The court held that the vendee could take advantage only of the pointing out of false boundaries, saying of the other representations: "They fall within that class of affirmations, which, although known by the party making them to be false, do not as between vendor and vendee afford any ground for a claim of damages in an action on the case for deceit . . . Assertions concerning the value

(27) 2 Allen (Mass.), 212.

of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property."

§ 152. **What is not "puffing:" Rental. Price paid on previous sale.** Representations as to what property is renting for, or as to the price paid at a previous sale are to be carefully distinguished from puffing. The former do not fall within the non-actionable class. Thus, representing that premises were let at £42 per annum when they were let at only £32 per annum was held actionable in Ekins v. Tresham (28). In Holbrook v. Connor (29) it was held that representing that the defendant had paid $14,000 for the land when he had paid much less, was not actionable, but there were two dissenting opinions; the weight of authority and the better view are in accord with this dissent.

§ 153. **Effect of parties being on an unequal footing.** If the parties are on an unequal footing, a representation which courts would otherwise be inclined to consider as puffing will be held to be actionable. In Coon v. Atwell (30) the plaintiff alleged that the defendant represented that the farm in question cut seventy-five tons of hay a year, and that what hay was on the land was all cut that year and was a good seventy-five tons; whereas in fact

(28) 1 Levinz, 102.
(29) 60 Maine, 578.
(30) 46 New Hampshire, 510.

the farm did not cut more than thirty-five tons a year, and the hay shown as cut that year was not all so cut, but a large quantity was cut the year before; also that the farm contained 250 acres, whereas in fact it contained only 175 acres. Both representations were held to be actionable, the court saying: "The defendant urges that the representations set forth are merely expressions of opinion. . . . It [the first representation] is not at all like the mere expression of an opinion as to value, but is a statement of a fact that in general would be peculiarly within the knowledge of the vendor; and to hold that it would be folly to confide in it would greatly tend to impair all further fair dealing."

§ 154. **Representations of law.** There seems to be no sufficient reason for holding a representation of law to be non-actionable, law being a species of fact. It is well settled that if one commits an offence against the law, such as a crime, a tort, or a breach of contract, it is no defence that he was ignorant of the law; it would be impossible to administer the law upon any other basis. A plaintiff who has been deceived, however, is not in the position of one asking to be excused for any offence. Unfortunately, instead of stating the rule in the proper form that "ignorance of the law is no excuse," it is often stated in the misleading form that "every one is presumed to know the law." This is perhaps the origin of the rule frequently laid down that representations of law are not actionable.

The rule, however, seems to be limited to pure representations of law; hence, statements as to personal status

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and ownership which involve questions of fact as well as of law do not come within the non-actionable class. There are, besides, other modifications of the rule which tend to restrict its application within narrow bounds. In Moreland v. Atchison (31) the defendant sold Texas land to the plaintiff, representing that he was an old settler in Texas, was familiar with the land laws, and that he had a good title to the land. The court held that while the general rule was that representations of law were not actionable, yet the defendant was liable here because the parties were not on an equality, and the defendant took advantage of his superior knowledge; the question of title involved matters of fact as well as of law; and also because the plaintiff, not being a Texan, the law of Texas was foreign law and should be considered as fact. The effect of the last modification is apparently to limit the doctrine to representations of the law of the plaintiff's own country, with which he is supposed to be familiar.

(31) 19 Texas, 303.

CHAPTER VI.

NEGLIGENCE.

SECTION 1. NATURE OF NEGLIGENCE.

§ 155. **Essentials of liability for damage caused by negligence.** The essentials of liability for damage caused by negligence are: (1) a legal duty to use care on the part of the defendant toward the plaintiff; (2) failure of the defendant to perform that duty; (3) damage to the plaintiff caused by such default.

§ 156. **When legal duty to use care arises.** The duty to use care to prevent damage to others must, of course, be legal and not merely moral, as was pointed out in Chapter I; but it is impossible to lay down any simple test for determining just when such a duty arises and when it does not. The reason for this is that the question comes up in so many essentially different states of facts. The cases which are discussed in this chapter—especially in Sections 1, 2, 6, and 7,—will show in a general way how far the law has gone in imposing the duty of care. During recent years the law has developed rapidly in the direction of imposing the duty under circumstances where none was imposed before; because, in the increasing complexity of civilized life, the individual has in many in-

stances become less able to protect himself against loss and so must rely upon society for such protection.

§ 157. **Must duty be owed to plaintiff: Intentional torts.** Must there be a breach of duty toward the plaintiff, or is it sufficient that there has been a breach of duty to use care toward some third person? In the law of intentional torts it seems well settled that if one intends to injure X and, in attempting to do so, accidentally injures Y, the latter may recover. The effect of this is sometimes expressed by saying that the intent is transferable. A similar rule prevails in the law of crimes. Thus in Queen v. Saunders (1) the defendant gave his wife a poisoned apple intending to cause her death; the wife did not eat it but gave it to their daughter in the defendant's presence; the latter ate it and died. The defendant did not intend the death of the child but he was held guilty of murder just as if he had so intended.

§ 158. **Same: Statutory duty.** On the other hand, where no duty to use care exists at common law but one has been imposed by statute, it seems clear that the plaintiff must show not only that the duty so imposed was violated, but also that he was meant to be protected by the statute—that is, that the duty was owed to him. In Smith v. Tripp (2) the plaintiff sued the city of Providence for so negligently keeping a street as to cause water to flow upon the plaintiff's land adjoining. It was held that the plaintiff was not entitled to recover, the

(1) 2 Plowden, 473.

(2) 13 R. I., 153.

court saying: "The plaintiff contends that it is enough for him to allege that the injury was caused by neglect to keep the highway in repair, and that it is not necessary to set forth the particular facts, because the duty of keeping its highways in repair is a public duty imposed by statute. In our opinion the argument is fallacious. The duty which the statute imposes is a duty to keep the highways in repair, not so that the water will not flow from them upon adjoining lands, but so that they will be safe and convenient for travellers. The declaration does not allege any neglect of duty in this respect, and if it did allege a neglect of duty in this respect, and also allege that in consequence of it water flowed from the highway upon the plaintiff's land, nevertheless it would not show any cause of action; because the only cause of action which could be maintained against the city for neglecting to keep the street safe and convenient for travel is an action for an injury suffered in consequence of the street's being unsafe and inconvenient for travel, and not for injury suffered by the overflow of surface water from the street."

§ 159. **Same: Duty to a class.** It is well settled that the duty need not be owed to the plaintiff individually; it may be owed to a class of persons of whom the plaintiff is one. Thus one who drives a team through a street owes a duty of care toward all who happen to be on the street at the time; that he may be personally unacquainted with the persons or unaware of their existence does not negative the existence of the duty.

§ 160. **Same: May common law negligence be trans-**

ferred? Whether the duty must be owed to the plaintiff in cases where the duty to use care has been imposed by the courts, or whether it may be transferred, as intent may be, has not been thoroughly discussed. In many cases where the question might have been raised squarely, the case has been decided on other grounds. In Hoag v. Lake Shore &c. Railroad Company (3) the defendant's railway passed through the plaintiff's land at the base of a high hill, along a creek; during a rainstorm there was a slide of earth and rock from the hillside down to and upon the railroad track. One of the defendant's engines, drawing a train of cars loaded with crude oil, ran into the slide and was thrown off the track; two or three of the oil cars burst, the oil caught fire, was carried down the creek for several hundred feet and set fire to the plaintiff's property. It seemed clear that no damage to the plaintiff could have been foreseen and whatever negligence there was was the breach of duty to the owner of the oil. The only question raised, however, was that of legal cause, the defendant's counsel perhaps assuming that negligence to the owner of the oil was sufficient. The defendant was held not liable.

Where defendant wrongfully shot a dog and thereby caused fright and sickness to a woman not known by defendant to be near, defendant was held not liable for want of the breach of any duty owed to the woman (3a); and where a railway train carelessly collided with A and hurled his body against X, 50 feet distant, X was not al-

(3) 85 Pa., 293.

(3a) Renner v. Canfield, 36 Minn. 90.

lowed to recover against the railroad for the same reason (3b). Apparently, then, a defendant is liable for a negligent injury only where he has been negligent toward the plaintiff.

§ 161. **Standard of care: Ordinary prudence.** The standard of care required by the law of torts is that degree of care which would be exercised by a man of ordinary prudence under the circumstances. In Vaughn v. Menlove (4) the plaintiff's property was destroyed by a fire which started by the spontaneous combustion of a hay-rick which had been put up by the defendant. The defendant's counsel contended that, if the defendant had acted in good faith to the best of his judgment, he ought not to be liable, because he ought not to be responsible for the misfortune of not possessing a higher order of intelligence. The court, in refusing to uphold this contention, said: "Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

§ 162. **Same: Under the circumstances.** Whether the amount of care owed is great or small or whether the defendant is under any duty of care at all depends upon the circumstances; hence negligence is a relative term. Conduct which would be considered negligence under

(3b) Wood v. Penn. R. R. Co., 177 Pa. 306.

(4) 3 Bingham's New Cases, 468.

some circumstances might be considered due care under other circumstances. In Meredith v. Reed (5) the defendant kept a stallion which escaped from the defendant's stable and injured the plaintiff's mare. The court said: "It is contended, on the one hand, that ordinary care was all that the law required of the defendant in this case. On the other it is claimed that the utmost care was necessary to free him from liability. Ordinary care is all that the law required in the case in judgment. What is ordinary care in some cases would be carelessness in others. The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so, in the management of a steam-engine greater care is necessary than in the use of a plow. Yet it is all ordinary care; such care as a prudent, careful man would take under like circumstances. The degree of care is always in proportion to the danger to be apprehended."

§ 163. **Duty to guard against the unlawful acts of others.** If at the time the defendant is acting or about to act, other persons are, to the defendant's knowledge, acting wrongfully, this may impose upon the defendant a greater duty of care than he otherwise would have; it is one of the surrounding circumstances which determine the extent of his obligation of care. If, however, the wrongful act of the other parties is only in anticipation, does the fact that the defendant does anticipate it likewise impose upon him a greater duty? This question

(5) 26 Indiana, 334.

does not seem to have received much attention in tort cases. In a criminal case, Beatty v. Gilbanks (6), certain members of the Salvation Army assembled together for the lawful purpose of peaceably marching through the streets of a town; they knew that if they did so they would come into collision with another organization antagonistic to themselves, and that the latter would probably commit breaches of the peace. The former did march through the streets and thus caused the breaches of the peace to be committed. It was held, however, that they were not liable for such misconduct, the act of marching being in itself lawful.

It would seem, in analogy to the above case and upon principle, that the same rule ought to prevail in the law of torts. In the law of bills and notes, however, it has been held that one may be under a duty to guard against the unlawful act of another—for example, forgery or the alteration of an instrument.

§ 164. **Degrees of care.** In contractual law—for example, in the law of bailments—the parties may generally contract for any degree of care that they choose; the legal degrees of care in the law of bailments are usually considered to be three—slight, ordinary and great. But in the field of torts, the law has made no classification; while the circumstances that may arise vary greatly and therefore the care which the law requires likewise varies, the same standard applies to all cases,—that of the ordinarily prudent man under similar circumstances; and this is usually called ordinary care. Since there is just one

(6) 9 Q. B. D., 308.

standard for all cases, there are no legal degrees of care in torts.

§ 165. **Degrees of negligence.** The amount of care which the defendant actually used may have been only slightly less than that which the law requires, or it may have been very much less; this is sometimes expressed by saying that the defendant was slightly negligent, or that the defendant was grossly negligent. The defendant is liable to the same extent, however, in each case; hence, though there may be many degrees of negligence in fact, they have no legal significance; there are no legal degrees of negligence.

§ 166. **Boundary line between intent and negligence.** Though intent is, strictly speaking, a state of mind, while negligence is a matter of behaviour or conduct irrespective of the state of mind, the boundary line between the two is not susceptible of clear definition. It does not seem to be well settled whether a person who knowingly takes chances is to be deemed an intentional or a negligent wrongdoer. It is sometimes said that negligence necessarily implies inadvertence—that is, that the defendant did not have the possibility of the plaintiff's damage in mind as a result of his act. This, however, seems doubtful. Where the chances of damage are very slight the mere fact that the defendant had the possibility in mind would not seem to make him an intentional tort feasor. On the other hand, if the defendant knowingly takes chances where the chances are considerably in favor of causing the plaintiff damage, it would seem fair to consider the defendant an intentional wrongdoer even

though he did not really desire the result. The chief importance of drawing the line between intent and negligence is that contributory negligence of the plaintiff is generally a defence to a negligent tort but is no defence to an intentional tort (§ 197, below).

§ 167. **Negligence a mixed question of law and fact.** Since the law has not undertaken to define exactly what a person must do in all the possible circumstances that may arise but has contented itself with a rule sufficiently indefinite to apply to all cases, the questions of what is due care in the particular case and whether the defendant did or did not exercise that care are not separated. As to whether this mixed question should be decided by the court or jury is not everywhere settled. In most cases the question is submitted to the jury, with instructions from the court. If the jury could reasonably find only one way, the court may decide it just as it may decide pure questions of fact which the jury could reasonably find only one way. It is perhaps held in a few jurisdictions that where the facts are undisputed and the only question is whether the defendant was negligent or not, the court should always apply the law to the case; but generally the ultimate question—whether on these admitted facts the party has exercised due care or not—goes to the jury if there is any doubt about it (7).

§ 167a. **Statutory liability for causing human death.** At common law no civil action lay for causing the death of a human being, whether due to intentional or negligent acts. A master or husband could sue for injuries to serv-

(7) Ry. Co. v. Stout, 17 Wall., 657, 653.

ant or wife, but not for their deaths. Of course this was illogical, and it has been attributed to a repugnance to placing a pecuniary value upon human life. By Lord Campbell's act in 1846 in England, an action was allowed for the death of a person, whenever the person himself could have sued for an injury, had he survived; the action being for the benefit of spouse, parent, or child of the injured person, and the damages measured by the pecuniary injury to the beneficiaries. This statute, in some form, has been copied in all American states, there being much variation regarding the party to bring the suit and the beneficiaries. In some states the recovery may not exceed a certain sum, usually $5,000 or $10,000. Where suit is brought for causing death the same defenses are available as when the suit is for causing injury, and injury and death are discussed together in all parts of this article. This statement is inserted here because most actions for death are brought for negligent acts. See Damages, §§ 100-4, in Volume X.

Section 2. Legal Cause.

A. In general.

§ 168. Defendant's negligence must cause plaintiff's damage. It is essential not only that the defendant be negligent and that the plaintiff suffer damage, but the default must be the cause of the damage. Mere negligence without causing damage is no ground for an action. For example, if one should ride or drive a horse negligently through a crowded thoroughfare but damaged no one by such negligent driving, no action would lie.

§ 169. When legal cause is a part of the law of torts. Wherever special damage does not need to be proved in order to make out a cause of action—for example, in trespass to land, conversion or libel—questions of legal cause are chiefly important in determining the amount of damages to which the plaintiff is entitled; such questions, therefore, belong to the law of damages. But where special damage is an essential element of the tort, as in negligence cases, there the question as to whether the damage suffered by the plaintiff was caused by the defendant's default becomes a part of the law of torts. Since a large part of modern tort litigation is composed of negligence cases, and since the most difficult questions of legal cause arise in such cases, the subject is treated in this chapter.

§ 170. Meaning of legal cause.—A mixed question of law and fact. *Legal* cause as distinguished from chemical cause, physiological cause, and so forth, shows that causal connection is sought to be traced to a human agent and that legal liability is sought to be imposed upon him. While a question of cause is one purely of fact, a question of legal cause involves also a question of law, namely, for what part of the consequences flowing from his wrongful act is a defendant to be held responsible? Like the question of negligence, the question of legal cause is a mixed one of law and fact, and for the same reason, namely, that the law does not lay down a definite rule.

B. Suggested rules of legal cause.

§ 171. **Defendant not liable for remote consequences.—The "natural and proximate consequence" rule.** Our knowledge of the laws of nature is so imperfect that it is often a difficult matter to determine whether the plaintiff's damage is a consequence of the defendant's act. In order, therefore, to secure practical justice, it has long been settled that a defendant will not be held liable for such consequences as are far removed in the chain of causation. Such consequences are called remote in contradistinction to near or proximate consequences. One of the suggested rules of legal cause holds a defendant liable for such consequences as are natural and proximate; such a rule excludes only unnatural and remote consequences. Just how far removed in the train of causation the consequences must be in order to be excluded on the ground of remoteness, the law does not attempt to define.

§ 172. **Remoteness not controlled by time or distance.** Remoteness is governed by the efficiency of the defendant's act in causing a succession of events rather than by the elements of time or distance. In Poeppers v. Missouri, &c., Railway Co. (1), some sparks from a locomotive of the defendant set fire to the prairie near the defendant's track about two o'clock in the afternoon of a certain day; the grass being very rank and dry and the wind being high, the fire extended about two and one-half miles before night and continued to burn through the night, though slowly; but in the morning the wind rose again and blew hard, as was not unusual in that country,

(1) 67 Mo., 715.

and carried the fire some five miles farther, till it reached the plaintiff's property and destroyed it. The court below instructed the jury that although they must, in finding a verdict, be governed by the maxim that every one is liable for the natural and proximate, but not for the remote damages occasioned by his act; yet this maxim is not to be controlled by time or distance; that if there was but one continuous conflagration from the time the fire was set at or near the railroad track till, by its natural extension, it extended to and burned the plaintiff's property, in such a manner as to constitute but one event, one continuous burning, and that the damage complained of was, under the surrounding circumstances, the natural result of the escape of the fire from the engine of the defendant, through defendant's negligence, they should find for the plaintiff, if the said damage was not caused by any fault of the plaintiff. This instruction was held correct and the judgment for the plaintiff was affirmed.

§ 173. **Defendant liable for probable consequences.—New York rule as to liability for fire.** It seems also well settled that a culpable defendant is liable at least for such consequences as might have been foreseen by a prudent man in the position of the defendant. There seems to be only one line of cases inconsistent with this. It has been held in New York and perhaps a few other jurisdictions that a defendant who negligently sets fire to a building which in turn sets fire to other buildings is liable only for the first building. In Hoyt v. Jeffers (2) the absurdity

(2) 30 Mich., 181.

of such a rule was pointed out, the court saying: "The argument is, that, though defendant may be liable for the loss of the particular building first set on fire through his negligence, and such others as are in actual contact with it, yet his liability can not be extended to others not in such actual contact, or where there is an intervening space, however small, between them. Now, it is so well settled as to be treated almost as an axiom in natural philosophy, that no two particles of matter actually touch each other, and that there is always an intervening space, however small, between them. The defendant's liability must, therefore, be confined to the particular particle or particles of matter which actually first caught fire, and the whole conflagration resulting, not only of the particular board or shingle, but of the house, must be treated as a new consequential injury too remote to serve as a safe ground of damages. This, it may be said, is unreasonable, and ludicrously absurd; and so it is; but it is only slightly more absurd than it would be to hold that defendant's liability must be limited to the first building burned, because the others were not a part of it, or in actual contact with it, but five or six feet distant....I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first, were five, six, or fifty feet, or the one-hundredth part of an inch from it... If it be said that this extent of liability might prove ruinous to the party through whose negligence the building were burned, it may be said, in reply, that, under such circumstances, it is better, and more in accord with the

relative rights of others, that he should be ruined by his negligence, than that he should be allowed to ruin others who are innocent of all negligence or wrong."

§ 174. **The "natural and probable consequence" rule.** Another rule of legal cause which has been frequently laid down holds a culpable defendant liable for natural and probable consequences. Strictly applied, it would excuse a defendant for improbable as well as for remote consequences. Such a rule obviously makes the test of legal cause and the test of negligence very similar, and the origin of the rule may have been due to the confusion of the two ideas often found in the cases. A typical illustration of such confusion is found in the opinion of Pollock, C. B., in Greenland v. Chapin (3); the first sentence of the paragraph states a question of legal cause, while the next sentence, purporting to be an answer to the first, states a test of negligence: "I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur."

(3) 5 Exchequer, 248.

§ 175. **Defendant liable for immediate consequences, though improbable.** Even in jurisdictions which usually lay down the natural and probable consequence rule, if the damage follows immediately the mere fact that it was improbable does not excuse the defendant. In Hill v. Winsor (4) tort was brought against the owners of a tug for personal injuries sustained by the plaintiff through the alleged negligence of those in charge of the tug in causing her to strike violently against the fender of a bridge, on which the plaintiff was at work. The fender consisted of a row of piles driven perpendicularly into the bed of the stream and another row driven at an angle to the first; the plaintiff was standing on a plank fastened to the piles and had put a brace between one of the uprights and one of the inclined piles in order to keep them apart while he fitted them to be fastened together. The striking of the tug against the fender caused the brace between the piles to fall out, the piles came together, the plaintiff was caught between them and was severely injured. The trial court instructed the jury as follows: "The accident must be caused by the negligent act of the defendants; but it is not necessary that the consequences of the negligent act of the defendant should be foreseen by the defendants....It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee one or the other. Still, it is negligence for me to put this obstruction in the highway, and that may be the natural and necessary cause...." The

(4) 118 Mass., 251.

upper court held the instruction correct, saying: "It can not be said, as a matter of law, that the jury might not find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it resulted should have been foreseen."

§ 176. **Liability for improbable consequences not immediately following.** Whether a negligent defendant is liable for improbable consequences which do not follow immediately but which are not remote seems not to be definitely settled. The only good reason for excusing a defendant for such consequences is that, although the line between probable and improbable is not a clearly defined one, it is perhaps easier, on the whole, to determine what is probable than it is to determine what is proximate. This does not seem, however, to be a sufficient reason. In Smith v. London and Southwestern Railway Company (5) action was brought against the defendant for negligently burning the plaintiff's cottage. The defendant contended that he ought not to be held liable because no reasonable man could have foreseen that the fire would consume a hedge and pass across a stubble field and so get to the plaintiff's cottage at a distance of two hundred yards from the railway, crossing a road in its passage. The judgment for the plaintiff was affirmed, Channell, B., saying, "...when it has once been determined that there is evidence of negligence, the person

(5) Law Reports, 6 C. P. 14.

guilty of it is equally liable for its consequences, whether he could have foreseen them or not." And Blackburn, J., said: "I also agree that what the defendants might reasonably anticipate is, as my brother Channell has said, only material with reference to the question whether the defendants were guilty of negligence or not, and cannot alter their liability if they were guilty of negligence.... If the negligence were once established, it would be no answer that it did much more damage than was expected."

Earl, J., in Ehrgott v. Mayor of New York (6) said: "When a party commits a tort resulting in a personal injury, he cannot foresee or contemplate the consequences of his tortious act. He may knock a man down, and his stroke may, months after, end in paralysis or in death—results which no one could have anticipated or could have foreseen. A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused. Here, nothing short of omniscience could have foreseen for a minute what the result and effect of driving into this ditch would be. Even for weeks and months after the accident the most expert physicians could not tell the extent of the injuries. The true rule, broadly stated, is that a wrong-doer is liable for the damages which he causes by his misconduct. But this rule must be practicable and reasonable, and hence has its limitations. A rule to be of practicable value in the law must be reasonably certain. It is impossible to trace any wrong to all its consequences. ....The best statement of the rule is that a wrong-doer

(6) 96 N. Y., 280.

is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury. We are, therefore, of the opinion that the judge did not err in refusing to charge the jury that the defendant was liable "only for such damages as might reasonably be supposed to have been in the contemplation of the plaintiff and defendant as the probable result of the accident."

§ 177. **The "but for" rule.** In Gilman v. Noyes (7) the evidence tended to show that the defendant had left the plaintiff's bars down, whereby the plaintiff's sheep had escaped from the pasture and had been destroyed by bears. The trial court instructed the jury that if the defendant left the plaintiff's bars down, and the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed *but for* the act of the defendant, he was liable for their value. The upper court held that this instruction was not correct, Smith, J., saying: "The sheep would not have been killed, the jury say, but for that (the defendant's) act; does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect

(7) 57 N. H., 627.

to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything that happens would not have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent."

§ 178. **The "last human wrongdoer" rule.** A fourth rule which has been suggested is that the last human wrong-doer is liable for the plaintiff's damage. This rule is of little value because it lays no emphasis upon the necessity of causal connection; besides, as will be seen, where two human wrong-doers act in succession, both may be liable.

C. Intervention of non-human forces.

§ 179. **Ordinary inanimate forces.** The intervention of the ordinary forces of nature between the defendant's act and the plaintiff's damage does not usually break the causal connection. In Bailiffs of Romney Marsh v. Trinity House (8) the defendant's ship had struck against the sea wall of the plaintiff. It was shown that the captain and crew had been negligent in running the ship aground upon a shoal, after which, on account of the high wind and tide, it was impossible to prevent the ship from drifting against the plaintiff's wall which was about three-quarters of a mile distant. The defendants contended that they ought not to be liable, because there intervened between their act of negligence and the alleged consequences a series of natural causes over which they had

(8) Law Reports, 5 Ex. 204.

no control, and which could not be calculated on, such as the shifting of the wind, its violence, and the force of the tide as dependent upon it. The court decided that the defendants were properly held liable, saying: "The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at that moment to the sea. The case, therefore, appears to me to be the same as if the ship had been lying at anchor, and the tide flowing rapidly towards a rock, and the defendants had, by some negligence, broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock, and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think it would, and that such a case and the case before the court are the same; that the negligence of the crew, the servants of the defendants, was thus the immediate cause of the ship being driven against the wall of the plaintiffs, and that the plaintiffs are therefore entitled to recover."

§ 180. **Ordinary movements of animals.** In McDonald v. Snelling (9) the declaration alleged that the defendant's servant negligently drove a horse and sleigh against the sleigh of one Baker so that Baker was thrown out and Baker's horse ran down the street and ran into the plaintiff's horse and sleigh and injured the plaintiff. The court held that the declaration was sufficient, saying:

(9) 14 Allen, 290.

"[The declaration alleges] that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run violently along Tremont Street round a corner, near by, into Eliot Street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act."

§ 181. **Diseases of the human body.** In Bishop v. St. Paul Railway Company (10) the plaintiff was injured by the negligent upsetting of the defendant's cable car. Seven months later, without other apparent cause, paralysis supervened, involving the whole left side. The question was whether the defendant was liable for causing the paralysis. The court said: "The injury received at the time of the accident was the proximate cause of the

(10) 48 Minn., 26.

paralysis, if it caused the disease in the course of which and as a result of which the paralysis followed."

D. Concurrent negligence.

§ 182. **In general.** The fact that the act of a third person concurs with that of the defendant to produce the plaintiff's damage does not in any way excuse the defendant. If the third person is culpable—acts negligently or intentionally—he also may be liable.

§ 183. **Active force exerted by both defendant and a third person.** In Matthews v. London Street Tramways Company (11) the plaintiff was injured in a collision between the omnibus upon which he was riding and a tram car driven by the defendant's servants. The trial court instructed the jury that to find a verdict for the plaintiff, they must be satisfied that the injuries he sustained occurred solely through the negligence of the defendant's servants. The higher court held that the instruction was wrong, because the defendant should be held liable even if his negligence was only a part of the cause, Manisty, J., saying: "It appears to me that it was the duty of the learned judge to give the jury the following direction: Was there negligence on the part of the tram car driver which caused the accident? If so, it is no answer to say that there was also negligence on the part of the omnibus driver."

§ 184. **Active force exerted by third person only.** The defendant is also liable if a dangerous passive condition

(11) 60 Law Times Rep. (N. S.), 47.

created by him concurs with active force brought to bear by a third person in causing the plaintiff's damage. In Village of Carterville v. Cook (12) action was brought against defendant village for injuries caused by negligently permitting the sidewalk to be out of repair. Plaintiff, a boy of fifteen, while passing along a much-used public sidewalk of the defendant, was by reason of the inadvertent or negligent shoving by one boy of another boy against him, jostled or pushed from the sidewalk, at a point where it was elevated some six feet above the ground and was unprotected by railing or other guard, and thereby seriously injured. The court held that the judgment for the plaintiff should be affirmed; that whether the act of the third party was negligent or accidental, it did not excuse the defendant; and that if the act of the third person was negligent, the plaintiff might sue either.

In Pastene v. Adams (13) plaintiff alleged that the defendant negligently piled lumber in the street in front of his lumber yard; that one Randall, in driving a team from the yard into the street, caught the lumber with the wagon wheel and threw it upon the plaintiff, seriously injuring him. The court affirmed the judgment, saying: "If the timbers were negligently piled by the defendants, the negligence continues until they were thrown down, and (concurring with the action of Randall) was a direct and proximate cause of the injury sustained by the plaintiff."

(12) 129 Ill., 152.
(13) 49 Calif., 87.

E. Intervening act of a third person.

§ 185. Intervention distinguished from concurrence. Where, after a dangerous passive condition has been created by the defendant, a third person comes into control of the situation and causes the plaintiff's damage, it is a case of successive rather than concurrent action, the third person thus intervening between the defendant's act and the plaintiff's damage.

§ 186. Defendant liable if he caused the intervening act. Where the defendant's wrongful act has caused the intervening act of the third party he ought clearly to be held liable. As a practical matter, causation can usually be proved in such a case only by showing that the intervening act should have been forseen by the defendant. If the intervening actor is also a wrong-doer, he too is liable. In Scott v. Shepherd (14) which is generally known as the "squib case," the only question which was really decided was that if the plaintiff was entitled to bring any action at all, trespass was the proper form and not an action on the case. It is frequently cited, however, as deciding a question of substantive law. In that case the defendant threw a lighted squib or firecracker into a market house where there were a great many people; it fell upon the market stand of one Yates; one Willis, in order to prevent injury to himself and the wares of Yates, took up the lighted squib and threw it across the market house, where it fell upon the market stand of one Ryal, who instantly and to save his own

(14) 2 W. Blackstone, 892.

wares from being injured, took up the squib and threw it to another part of the market house where it struck the plaintiff in the face and, exploding, put out one of his eyes. Though divided upon the question as to whether trespass was the proper remedy, the four judges agreed in thinking that the defendant should be held liable. Though Willis and Ryal in turn had control of the situation, their acts—whether done instinctively or rationally in self-defence—were such as ought to have been foreseen by the defendant. If, however, the act of Ryal in striking the plaintiff in the face had been intentional, such an act would not ordinarily be anticipated, and the defendant would not be held liable unless the plaintiff could show that in the circumstances of this particular case the defendant should have foreseen it.

In Harrison v. Berkley (15) defendant wrongfully sold liquor to the plaintiff's slave. The slave became intoxicated and was found dead the next morning from the intoxication and consequent exposure to the weather. It was held that the jury was justified in finding a verdict for the plaintiff; the slave's will being known by the defendant to be weak, the act of becoming intoxicated was such as the defendant should have foreseen. As the court pointed out, if the defendant had wrongfully sold the slave a rope, but without suspicion that he intended to hang himself, and the slave had hanged himself, the defendant would not have been held liable for such self-destruction, because he could not truthfully be said to have caused it.

(15) 1 Strobhart's Reports, Law (S. C.) 525.

§ 187. Defendant not liable if he did not cause the intervening act. In Carter v. Towne (16) action was brought for unlawfully selling to plaintiff, a child of eight, some gunpowder which he fired off and was thereby injured. The trial court instructed the jury that "if the mother knew of the use of the powder by the plaintiff at the time of the accident, the defendants would not be responsible; but that the fact that she knew of his use of it on the preceding 4th of July would not necessarily prevent the plaintiff from recovering, unless the jury found that the fact that she knew of his use of it on the 4th of July ought to have led her to believe that the plaintiff might have obtained possession of it and used it without her knowledge, on the occasion of the accident, and if so, then it was her duty to have put it where he could not possibly have got hold of it, and the defendant would not be liable." The upper court held that the instruction was erroneous, saying: "The testimony introduced for the plaintiff....shows that the gunpowder sold by the defendants to the plaintiff had been in the legal custody and control of the plaintiff's parents, or, in their absence, of his aunt, and for more than a week before the use of the gunpowder by which he was injured. Under these circumstances, that injury was not the direct or proximate, the natural or probable consequence of the defendant's act; and the jury should have been instructed in accordance with the defendant's request, that there was no legal and sufficient evidence to authorize them to return a verdict for the plaintiff."

(16) 103 Mass., 507.

§ 188. **Intervening failure of third person to act.** In Wiley v. West Jersey Railroad Company (17) action was brought to recover damages for the destruction of growing wood by fire alleged to have been communicated from an engine of the defendant. It was shown that the attention of the tenant of the land upon which the fire started was called to the existence of the fire, and the defendant contended that the tenant's failure to put out the fire broke the causal connection and relieved the defendant from liability. The court refused to sustain this contention, saying that the tenant's inaction, even granting it was culpable, gave no new direction to the fire and did not sever the train of causation.

F. Intervening act of the plaintiff.

§ 189. **Defendant liable if he causes the intervening act.** In Wooley v. Scoville (18) the plaintiff sued the defendant for negligence in throwing a bag of wool from a lofty warehouse into a yard, whereby the wool fell upon the plaintiff, who was in the yard, and injured him. Before the bag was dropped from the window, one of the defendant's servants called out to warn passengers; the plaintiff saw the wool and ran across the yard thinking he would have time to escape. The trial court told the jury that if they were of the opinion that the plaintiff ran wantonly into danger, they ought to find a verdict for the defendant; but if they thought the plaintiff had lost his presence of mind by the act of the defendant,

(17) 44 N. J. L. 247.

(18) 3 Manning v. Ryland, 105.

and in the confusion produced by the situation in which he found himself, had run into the danger, they ought to give their verdict for the plaintiff. This instruction was held to be correct.

If, instead of acting instinctively, the plaintiff acts reasonably for his own safety, a similar rule prevails. In Jones v. Boyce (19) action was brought for so negligently conducting a coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken. In instructing the jury, Lord Ellenborough said: "To enable the plaintiff to sustain this action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported.... The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation."

§ 190. **Defendant not liable if he did not cause the intervening act.** In Scheffer v. Washington, &c., Railroad Co. (20) the plaintiff's testator was injured in a collision caused by the negligence of the defendant's servants. He became insane and while insane took his own life about eight months after the injury. The question was whether the defendant was liable for wrongfully causing

(19) 1 Starkie, 493.
(20) 105 U. S., 249.

the testator's death. The court held that since the act of self-destruction was not caused by the defendant's act, the defendant should not be held liable. While the principle thus laid down is thoroughly sound, it may be doubted whether the lack of causal connection was so clear as to justify the court in deciding the case rather than submitting it to a jury.

Section 3. Contributory Negligence.

§ 191. General rule.—Plaintiff entirely barred. The general rule is that even though the defendant was negligent and his negligence was a part of the legal cause of the plaintiff's damage, yet if the plaintiff did not use ordinary care for the safety of himself or his property and such negligence was also a part of the legal cause of his damage, he is not entitled to recover. Such negligence on the part of the plaintiff is called contributory negligence. This doctrine seems to have been first laid down in Butterfield v. Forester (1). In that case action was brought for obstructing the highway whereby the plaintiff, who was riding along the road, was thrown from his horse and injured. The trial court charged the jury that if a person riding with reasonable and ordinary care should have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find for the defendant. The higher court held this charge correct, Lord Ellenborough saying: "A party is not to cast himself upon an obstruction which had

(1) 11 East, 60.

been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right....One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

By the general common law rule a plaintiff whose negligence contributed to his injury is entirely barred even though he was less to blame for the damage than the defendant. In Neal v. Gillett (2) the trial court instructed the jury that if the defendants were guilty of gross negligence which caused the injury the plaintiff was entitled to recover, though there may have been on his part a want of mere ordinary care which might have essentially contributed to produce the injury complained of. The upper court held that this charge was wrong, saying: "....When the gist of the action is negligence merely—whether gross or slight—the plaintiff is not entitled to recover, when his own want of ordinary, or reasonable care, has essentially contributed to his injury; because he is himself in fault, and because of the difficulty, if not impossibility, of ascertaining in what proportions the parties respectively, by their negligence, have contributed to the production of the injury, and whether it would have been produced at all but by the combined operation of the negligence of both. When the injury is intentional other considerations apply."

(2) 23 Conn., 437.

In Illinois and a few other states it was at one time held that if the negligence of the plaintiff were much less in degree than that of the defendant, the plaintiff could recover. This was called the rule of comparative negligence; it is no longer law anywhere, except by a few statutes, the most important of which is the new Federal carriers' liability act of 1908 (3).

§ 192. **Admiralty rule.** In admiralty cases, where there is no trial by jury, a plaintiff guilty of contributory negligence is not entirely barred, but may recover part compensation—usually one-half. In a collision case where the defendant also suffers some damage, the case is usually settled by adding the loss of both together, dividing the sum by two, and giving the plaintiff judgment for the difference between that sum and the amount of his own loss.

§ 192a. **Modern legislation.** The general common law doctrine of contributory negligence has been much criticised as unjust to plaintiffs; and since with the jury system divided damages does not seem feasible, there have been various exceptions introduced by legislation in recent years. In England, for example, the workmen's compensation act allows recovery to a workman against his employer except in cases of "serious and wilful misconduct." In other jurisdictions plaintiffs have been helped by statutes requiring the defendant in certain classes of cases to prove due care on his part as well as lack of due care on the part of the plaintiff.

§ 193. **Common law exception to the general rule.**

(3) 35 Stat. c. 149.

There is a common law exception to the general common law rule, but the exact limit of the exception is not well settled. In Davies v. Mann (4) plaintiff had fettered a donkey belonging to him and turned it out into the highway to graze. The defendant's wagon, with a team of three horses, coming down a slight descent ran over the donkey and killed him. The driver of the wagon was some distance behind the horses. The trial court told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant. This charge was held correct, Parke, B., saying, "although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover."

It does not clearly appear in the above case whether the driver saw the danger or whether his negligence consisted in not seeing it. In the United States the exception seems to be limited, by the weight of authority, to cases where the defendant alone saw the danger in time to avoid the damage by the exercise of ordinary care; this is frequently called "the last clear chance to avoid" rule. By the law of England the exception seems to be broader than this, but whether the test is that the defend-

(4) 10 Meeson v. Welsby, 546.

ant's negligence be later and nearer the accident, or that it alone be in motion at the time of the injury, or that the defendant alone be present at that time, does not seem to be settled.

In Radley v. London and Northwestern Railway Co. (5) plaintiffs, who owned a colliery near the defendant's railway, had left upon their sidetrack a car with a broken truck upon it, the combined height being about eleven feet. Defendant's servants, in pushing a long line of plaintiff's empty cars on to the siding, pushed the car with the broken truck upon it against a bridge of the plaintiff's and broke it, the car being too high to pass under. The court held that it was not sufficient to give the general rule of contributory negligence, saying: "....But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and though that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." It appeared in this case that the defendant's servants did not see what the danger was; their negligence consisted in not investigating when the train was stopped by the bridge.

§ 194. **Plaintiff's right to reimbursement.** The importance of the exception has been increased by holding that a plaintiff who has been compelled to pay damages to a third party may compel defendant to reimburse him.

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(5) L. R. 1 App. Cases, 754.

In Nashua Iron and Steel Co. v. Worcester and Nashua Railroad Co. (6) the plaintiffs alleged that by the defendants' careless management of their engine plaintiffs' horse was frightened and caused to run upon and injure one Ursula Clapp; that the latter sued the plaintiffs and recovered a judgment, which the plaintiffs paid. The court held the declaration sufficient, saying: "....If the plaintiffs' carelessness consisted solely in permitting the horse to be where it was at the time, and ordinary care by the defendants would have prevented its fright, or, if the plaintiffs, by proof of any state of facts competent to be shown under the declaration, can make it appear that at the time of the occurrence they could not, and defendants could, by such care have prevented the accident, they are entitled to recover."

§ 195. **Contributory negligence of children.—Standard of care.** In Cleveland Rolling Mill Co. v. Corrigan (7) plaintiff, a boy of fourteen, sued his employer for damages for personal injuries alleged to have been caused by the defendant's negligence. The defence set up was contributory negligence. The court said: "Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. ....We think it a sound rule, therefore, that in the application of the doctrine of contributory negligence to children, ... their conduct should not be judged by the same rule which governs that of adults, and while it is their duty to exercise ordinary care to avoid the injuries

(6) 62 N. H. 159.
(7) 46 O. St. 283.

of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.''

Though by the criminal law a child under seven can not be punished for a crime, there is no arbitrary limit in the law of torts fixing an age under which the child is not capable of exercising care. Except in a clear case the question is one for the jury.

Whether, when a child is a defendant, he should be held to a standard of care similar to the above, or to the same standard of care as adults are bound to exercise, does not seem to be settled.

§ 196. **Contributory negligence of the deaf or blind.—Standard of care.** It has been pointed out that blindness may have two different effects: one who is blind ought, in many circumstances, to take greater care than those who can see; but if a blind person properly finds himself in a dangerous situation, the neglect of precautions requiring eyesight will not prevent his recovery. It would seem that a similar rule should apply to other infirmities. Whether the deaf and blind and maimed are to be treated as distinct classes, as children are, or whether their infirmity is merely to be taken into consideration as one of the surrounding circumstances, does not seem certain. The difference between the operation of the two rules would be very slight.

§ 197. **Contributory negligence no defence to intentional torts.** In Steinmetz v. Kelly (8) plaintiff sued de-

(8) 72 Ind. 442.

fendant for an assault and battery; the defendant pleaded contributory negligence. The court said: "The doctrine can have no application to the case of an intentional assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery." Upon principle, it ought to be no defence to any tort intentionally committed upon the plaintiff.

§ 198. **Contributory negligence a defence to injuries by animals.** In Quimby v. Woodbury (9) plaintiff brought debt upon a statute to recover double damages for personal injuries suffered by him from being bitten by the defendant's dog. The trial court in charging the jury said: "If the plaintiff was bitten in consequence of not using due care in his conduct toward the dog, or if he wilfully, recklessly, or needlessly irritated or aggravated the dog, and in consequence of such conduct was bitten, he cannot recover, because the injury he received would be the result of his own carelessness or recklessness."

The statute had made an express provision that a plaintiff could not recover if at the time of his injury he was engaged in the commission of a trespass or other tort; the plaintiff argued that the making of some exceptions excluded others and therefore that contributory

(9) 63 N. H. 370.

negligence was excluded. The court held, however, that contributory negligence was such a well settled doctrine that the legislature evidently intended the statute to be construed with reference to it.

§ 199. **Plaintiff excused by statute from duty to use care.** In order that there be contributory negligence there must be a breach of duty, just as in the case of negligence toward others. Hence if by statute the duty is shifted from the plaintiff to the defendant, the former will not be barred by conduct which but for the statute would be contributory negligence. In Donovan v. Hannibal and St. Joseph Railroad Co. (10) an action, based upon a statute, was brought to recover double damages for injuries to cattle. The statute made it the duty of the railroad to fence its right of way; it had failed to build a fence between its right of way and the plaintiff's pasture; plaintiff turned his cattle into this pasture after giving the defendant due warning, and some of them were killed by the defendant's trains. The court said: "There has been no negligence in his pasturing his cattle upon his own premises;....he can not be deprived of the ordinary and proper use of his property by the failure of the railroad to perform its duty." To have held otherwise would have largely defeated the purpose of the statute.

§ 200. **Plaintiff not bound to guard against contingent negligence of others.** In Kellogg v. Chicago & Northwestern Railway Co. (11) fire was communicated to grass

(10) 89 Mo. 147.
(11) 26 Wis. 223.

negligently left by defendants on their right of way; it spread to grass left by the plaintiff on his land adjoining, and thence to his buildings. Defendant asked the court to instruct the jury that the plaintiff was barred by contributory negligence in leaving combustible material near defendant's right of way. The court held that this instruction was properly refused, saying: "In the exercise of his lawful rights, every man has a right to act on the belief that every other person will perform his duty and obey the law; and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person. . . . The learned counsel strongly combat this position, and argue that, if logically carried out, the doctrine would utterly abrogate the rule that a party cannot recover damages where, by the exercise of ordinary care, he could have avoided the injury; and so, in the present case, after discovering the fire, the plaintiff might have leaned on his plough-handles and watched its progress, without effort to stay it, where such effort would have been effectual, and yet have been free from culpable negligence. The distinction is between a known, present, or immediate danger, arising from the negligence of another—that which is imminent and certain, unless the party does or omits to do some act by which it may be avoided—and a danger arising in like manner, but which is remote and possible or probable only, or contingent and uncertain, depending on the course of future events, such as the future conduct of the negligent party, and other as yet unknown and fortuitous circum-

stances. . . . The plaintiff is not obliged to change his conduct or the mode of transacting his affairs, which are otherwise prudent and proper, in order to avoid such anticipated injuries or prevent the mischiefs which may happen through another's default and culpable want of care."

Section 4. Imputed Contributory Negligence.

§ 201. **In general.** In the previous section was discussed the question under what circumstances the plaintiff was barred by his own want of care for the safety of himself or property. In this section will be discussed the question under what circumstances will he be barred by the want of care of third persons. It is assumed that the plaintiff's damage was caused by the negligence of the defendant and of the third person.

§ 202. **Master and servant.** S, who is driving a delivery wagon for his master, M, a grocer, negligently collides with A's carriage. If A was acting with due care he is entitled to recover against M if the driver was acting within the scope of his employment; to express it differently, the negligence of S is imputed to M. If A were also negligent and M's wagon were also damaged, M would be barred by the negligence of S; that is, the contributory negligence of S is imputed to M. See the article on Agency in Volume I of this work.

With the exception of cases where the relation of master and servant exists, there has never been any serious contention that one is liable as defendant for the negligent act of another; but in a few classes of cases it has

been contended and sometimes held that a plaintiff is barred by the contributory negligence of another who is not his servant or agent.

§ 203. **Passenger and carrier.** In Thorogood v. Bryan (1) the action was for causing wrongful death, based upon a statute. The deceased was passenger in an omnibus which he had just gotten out of. He was knocked down and killed by another omnibus belonging to the defendant. The court told the jury to find for the defendant if they thought that the deceased was killed either by reason of his own want of care or by want of care on the part of the driver of the omnibus out of which he was getting. This charge the upper court held correct, saying: "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased." This remained the law in England for forty years when the case was overruled by The Bernina (2), on the ground that the driver did not become the agent or servant of the deceased or in any way identified with him merely because the latter became a passenger in the vehicle. If the deceased had taken control of the driver, giving him express directions where and how to drive, then the driver would have become his servant and the rule of master and servant would apply. The passenger may, of course, be barred by his own contributory negligence; for example, in selecting a cab driver who is intoxicated.

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(1) 8 C. B. 115.

(2) L. R. 12 Probate Div. 58.

The great weight of authority and the better view is against Thorogood v. Bryan and in accord with The Bernina.

§ 204. **Owner of goods and bailee or carrier.** If goods while in the possession of bailee or carrier are damaged by the negligence of the one thus in possession and a third person, it has been held that the owner is barred in an action against the third person, wherever the bailee or carrier would be barred; that is, the contributory negligence of the bailee or carrier should be imputed to the owner of the goods. The authorities are in conflict, and the contrary is the better view, there being no sound reason why the rule as to master and servant should be extended to such a case.

§ 205. **Child and parent or custodian.** In Hartfield v. Roper (3), the plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was that as the child was permitted by his custodian to wander into a position of such danger, it was without remedy for the hurts thus received unless they were intentionally inflicted, the court saying: "The infant is not sui juris. He belongs to another, to whom discretion in the care of his person is exclusively confined. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of an infant, his neglects the infant's neglects." With the exception of three or four states, this case is not now followed. While

(3) 21 Wend. (N. Y.), 615.

it is not impossible for an infant to have a servant or agent who can do what the infant can do, it is obvious that as a matter of fact a child of two years can not appoint an agent or servant. As the court in Newman v. Phillipsburg Horse Car Company (4) pointed out, "How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case [Hartfield v. Roper] it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law."

The only sound reason that can be urged in favor of the doctrine of Hartfield v. Roper is the practical one that since the negligent parent may use the amount collected in maintaining the child he will thus receive a benefit from his wrongful act. This reason, however, is not sufficient to justify the doctrine.

§ 206. Action brought by parent: Parent barred by his own contributory negligence. If the parent brings an

(4) 52 N. J. Law, 446.

action against a negligent defendant for compensation for the loss of services of his child, his own contributory negligence is a defense just as it would be in the case of damage to other property of the plaintiff—the right of the parent to his child's services being considered by the law a property right. Though there is no question of imputed negligence here, the case is usually classified under the head of imputed negligence in text-books and encyclopedias.

§ 207. **Action brought by parent: Standard of care of parent.** In determining whether a parent is negligent in taking care of his children, the weight of authority seems to be that his financial condition is to be taken into consideration as part of the circumstances. Parents who must work all day to provide for their families cannot reasonably be expected to give as much care as those whose means allow them to furnish constant attention.

§ 208. **Action brought for negligently causing death: Contributory negligence of beneficiary.** If an action is brought for negligently causing the death of another, and the beneficiary of the action was also negligent, the law of contributory negligence is, by the better view, applicable, since to allow recovery would be to allow the beneficiary to profit by the results of his own negligence. If, however, there are other beneficiaries who were not negligent, it would seem that they should not be barred. This question is not one of imputed negligence; it is rather a question of the construction of the statute which gives the right of action.

§ 209. **Action brought by parent: Child negligent.**

There is a class of cases of imputed negligence which is not generally recognized as such. Suppose the child is old enough to exercise care and his conduct is such that he would be barred from recovery against a negligent defendant; does this bar the parent who sues in his own right for loss of services, the parent not being negligent? There is perhaps no stronger reason for thus imputing the negligence of the child to the parent than there is of imputing the negligence of the parent to the child, but the authorities on the point deny any action to the parent. Similarly, the husband may not recover for a physical injury to the wife to which her negligence has contributed, nor a master for a like injury to a servant. The cases denying recovery seem to be inconsistent with another line of cases: namely, those allowing the parent to recover in seduction cases though the child may be held barred by her consent.

Section 5. Effect of Plaintiff's Illegal Conduct.

§ 210. **In general.** The general doctrine of this section is similar to that of contributory negligence. If a plaintiff is at the time of his injury engaged in an unlawful act (the cases are nearly all cases of violation of a statute) and such unlawful act is part of the legal cause of the damage, he is barred from recovery against a negligent defendant, though he is not barred from recovery for an *intentional* tort. The difficulty lies in determining when the act is a part of the cause.

§ 211. **Purpose of ordinance or statute violated by**

plaintiff. In Welsh v. Geneva (1) the plaintiff was moving a traction engine weighing six tons along the defendant's highway; coming to a bridge he concluded it was safe and attempted to cross it without spanning it with planks as required by statute in case of engines of that weight. It was held that it was proper to direct a verdict for the defendant since the use of the heavy engine contributed directly to the breaking of the bridge. In this case the purpose of the statute was to protect the bridge as well as the property of the travelers from any injury that happened.

In Sutton v. Wauwatosa (2), the plaintiff while in violation of the statute forbidding secular work on Sunday was driving cattle over a bridge; the cattle broke through due to the defective condition of the bridge. In an action brought against the defendant town for negligence, the court held that the plaintiff should not be barred because the act of the plaintiff was not a part of the legal cause of the damage, saying: "In the present case the weight of the same cattle, upon the same bridge, either the day before or the day after the event complained of, when the plaintiff would have been guilty of no violation of law in driving them, would most unquestionably have produced the same injurious result. . . . The law of gravitation would not then have been suspended, nor would the rotten and defective stringers have refused to give way under the super-incumbent weight, precisely as they did do on the present occasion."

(1) 110 Wis. 388.
(2) 29 Wis. 21.

In a physical sense, at least, the unlawful act of the defendant in driving the cattle on the bridge was just as much the cause of its breaking as driving the engine on the bridge in the case of Welsh v. Geneva; in each case the negligence of the defendant had created a dangerous passive condition and the plaintiff had brought active force to bear, and hence the argument of the court in Sutton v. Wauwatosa really amounts to this: that the purpose of the statute was not to prevent the breaking of the bridge and consequent loss of property, but to prevent the desecration of the Sabbath. It is this which distinguishes the case from Welsh v. Geneva.

In Berry v. Sugar Notch Borough (3) the defendant corporation had negligently left a tree standing in one of the streets, dangerous to travelers. The plaintiff, a motorman, while running a street car at the rate of fifteen miles an hour, was injured by the tree falling on the car. The ordinance made it illegal to run a street car more than eight miles an hour. It was held this did not bar the plaintiff since it was not a cause of the accident. If the tree had fallen before the plaintiff reached it, and because of the speed the plaintiff could not stop the car, he would have been barred but on the ground of contributory negligence rather than that of being engaged in an illegal act. The purpose of the statute in this case was obviously to protect pedestrians and people in their vehicles from being run over by the street cars; it was not to protect the car itself from being injured by falling trees.

(3) 191 Pa. 345.

§ 212. **Plaintiff barred because no duty on part of defendant.** In Johnson v. Irasburgh (4) the plaintiff sued the defendant town for injuries sustained by reason of the defendant's failure to keep the highway in repair as required by statute. At the time of the injury the plaintiff was violating another statute which forbade traveling on Sunday except in case of necessity or charity. The court held that the legislature did not intend to impose a duty upon the defendant towards those who were using a highway unlawfully, and that the plaintiff could not, therefore, recover.

§ 213. **Sunday cases in New England.** For many years in Massachusetts and a few other states a plaintiff engaged in violating a Sunday statute was held barred thereby from recovery for a negligent tort. Some of these cases could be sustained logically on the ground that the defendant's negligence consisted merely in creating a dangerous passive condition while the plaintiff's act consisted in bringing active force to bear—for example, those cases where the defendant's negligence consisted in allowing a highway to be out of repair and the plaintiff's act consisted in driving on the highway. In a physical sense, therefore the act of the plaintiff contributed to produce the damage. In Massachusetts this was changed by a statute in 1884 which provided that a violation of the statute relating to the observation of the Lord's day should not constitute a defense to an action for a tort suffered by a person on that day. The effect of this was to declare that there was no legislative inten-

(4) 47 Vt. 28.

tion thus to penalize plaintiffs. It is obvious that the purpose of such Sunday statute was not in any sense to prevent the injury complained of and hence according to the test of purpose should not bar plaintiff from recovery.

SECTION 6. DUTY OF MAKER OR VENDOR OF CHATTELS.

§ 214. **In general.—Early law.** If A constructs a wagon for his own use so carelessly that it is likely to break down with ordinary usage, and then uses it to haul passengers, it seems clear that if the passengers are injured because of the defective construction, they may recover against A. Suppose, however, that A sells the wagon to B who uses it to haul passengers and the passengers are hurt because of the defective construction, may these passengers recover against A?

In Winterbottom v. Wright (1), the plaintiff alleged in his declaration that the defendant had contracted with the postmaster general to supply the latter with mail coaches and to keep them in repair; that the plaintiff, a mail coachman, relying upon said contract, hired himself to the post-master general as a driver; that the defendant so disregarded his said contract that the mail coach was weak and unsafe and broke down and the plaintiff was seriously injured. This declaration was held bad and properly so, either because the plaintiff was apparently trying to state an action on the contract to which he was not a party, or because defendant's default was only in not repairing, which he was bound to do only by contract. The case, however, came to be cited and understood as

(1) 10 Meeson v. Welsby, 109.

deciding that the plaintiff had no remedy at all; that is, that the defendant owed no duty except to the man with whom he had contracted. While this case has been used with much effect to check the development of the law in this direction, we shall find that in many circumstances a defendant may be held liable in tort to persons other than those with whom he contracted.

§ 215. **Knowledge that third person is to use chattel.** In George v. Skivington (2) the defendant was a chemist and sold hair oil which he represented to be fit for washing the hair. One George bought a bottle to be used by his wife, the plaintiff, which the defendant knew. The plaintiff used the hair oil and was injured thereby. The defendant was held liable, Kelley, C. B., saying: "There was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty toward the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased." This case was a step in the right direction in holding that the existence of a contract between George and the defendant did not negative the existence of a tort duty to the plaintiff. The court did not lay down any broader rule than was necessary to decide the case; but it would seem that limiting the liability of the defendant to those whom he knows will use the article is arbitrary where the article is meant to be used by the public generally.

§ 216. **Articles dangerous to life.** In Thomas v. Win-

(2) L. R. 5 Exchcq. 1.

chester (3) action was brought for injuries sustained by a Mrs. Thomas, the plaintiff, from the effects of belladonna administered by mistake for dandelion. The defendant had sold a jar labelled as dandelion to one Aspinwall, a druggist in New York City; Aspinwall in turn sold to one Ford, a druggist at Cazenovia, New York, and Ford in turn sold to the plaintiff, who was made so ill by the use of the medicine that for a time it was thought that her life was in danger. The defendant was held liable, the court thus distinguishing the case from Winterbottom v. Wright; "But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. . . . The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label. . . . The duty of exercising caution did not arise out of the defendant's sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabelled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion by some person then unknown. . . . The plaintiff's injury and her remedy would have stood on the same principle, if the defendant had given the belladonna to Dr. Ford without price, or if he had put it in his shop without his knowledge, under circumstance which would probably have led to its sale on the face of the label."

§ 217. **Articles not dangerous to life.** In Blood Balm Co. v. Cooper (4) the defendant, a manufacturer, sold its

(3) 6 N. Y. 397.
(4) 83 Ga. 457.

patent medicine to a retail druggist who sold some of it to the plaintiff Cooper; the plaintiff took it according to the directions, and was injured by the large amount of iodide of potash which it contained. The court held the defendant was liable, saying: "The medicine sold was not a deadly poison and no label was put upon it calculated to deceive anyone in this respect. But accompanying this medicine was a prescription of the proprietor stating the quantity to be taken, and the evidence tended to show that the quantity thus prescribed contained iodide of potash to such an extent as, when taken by the plaintiff, produced the injury and damage complained of. The liability of the defendant to the person injured arises, not by contract, but for a wrong committed by the proprietor in the prescription and direction as to the dose that should be taken."

If the medicine had not been a patent medicine but had been prescribed for a particular patient, to be used only by that patient, there would be no liability toward anyone else who should use it. In the case of patent medicines they are offered to the public and any member of the public may use them, if the directions are followed; hence if injury results the proprietors are properly held liable.

The principal case represents the correct view upon principle and it is the position which the law will ultimately take, but it is doubtful whether a majority of courts would hold that there was a duty of care to the public, except in cases of articles dangerous to life. As to whether the article must be dangerous to life in its

ordinary condition—as poison is—or whether it need only be dangerous to life in its defective condition—like a folding bed or diseased meat,—does not seem to be settled. The better view, of course is that it need only be dangerous to life in its defective state, since the public is just as much endangered and also because the rule is, in any event, too narrow.

§ 218. **Liability of building contractors toward third persons.** Closely connected with the liability of dealers in chattels is the liability of a building contractor toward third persons. In Curtin v. Sommerset (5) the defendant contracted with a hotel company to build and built a hotel building; after the building was completed and accepted by the hotel company, the plaintiff, a hotel guest, was injured by a defect in the porch. The court held that after acceptance by the hotel company the defendant could not be held liable. The case is not, however, satisfactory in its reasoning, one of the arguments being as follows: "The consequence of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to imagine the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned." The answer to this argument is,

(5) 140 Pa. 70.

that although it would be too heavy a burden to insure that the building had no hidden defect, it is not unreasonable to require that the buyer either require that the builder refrain from building, use due care in the construction, or warn those who are to use the building of the defect.

Section 7. Duty of Care on the Part of Occupier of Land or Building.

A. Duty toward trespasser.

§ 219. **In general.—Passive condition of the premises.** The general rule is that so far as the passive condition of the premises is concerned, the occupier is under no duty to a trespasser to keep the premises in repair or to warn of any peril; the defendant owes him no greater duty because of occupying the land. Thus if A sees B, a stranger, approaching an old well which is covered with rotten boards which may break through, he is under no legal duty to warn whether the well be upon his own land or upon the land of another.

In Lary v. The Cleveland, etc. Railroad Co. (1) action was brought for a personal injury alleged to be caused by the defendant's failure to repair a building formerly used by the defendant as a freight house. It appeared that the plaintiff took refuge in the building from a storm; the wind blew the roof off and a fragment fell on him. It was held that the plaintiff was not entitled to recover, the court saying: "The plaintiff was a tres-

(1) 78 Ind. 323.

passer, and as such he entered upon the defendant's premises, taking the risk of all mere omissions of the defendant as to the condition of the ground and buildings thus invaded without leave. . . . There could be no negligence on the part of the defendant of which the plaintiff can be heard to complain unless at the time he received the injury the defendant was under some other obligation or duty to him to repair his freight house. . . . The defendant owed the plaintiff no such duty."

§ 220. **Changing the condition of the premises.** As was pointed out in § 62, above, the occupier of land may use reasonable force to eject the trespasser. As to bringing force to bear upon the trespasser other than such reasonable force as may be used to eject him, the fact that he is a trespasser is of no importance, provided the occupier knew at the time of his presence. Thus in Lary v. The Cleveland etc. Railroad Co., above, if the defendant's servants had been engaged in fixing the roof at the time the plaintiff was in the building, and they had known of his presence, they would have been under a duty in thus changing the condition of the premises to use ordinary care for his safety; hence if the roof had fallen upon him due to their lack of care in this respect, the defendant would have been liable.

So in Phillips v. Wilpers (2) the plaintiff, a painter, for the purpose of painting the front of the building fastened one of the ropes supporting his scaffold around the chimney of the defendant's house adjoining.

(2) 2 Lansing (N. Y.), 389.

The plaintiff's evidence tended to show that the defendant unfastened the rope; the plaintiff, not knowing or having reason to know that it had been unfastened, was injured by the scaffold falling. The court said: "If the defendant intended to remove the rope, which he doubtless had a right to do properly, he was bound to exercise reasonable prudence, and to have accomplished the work in such manner as to give notice to those who should be effected thereby. If the jury should conclude that the defendant only partially unloosened the rope, so that it appeared to those who went upon the scaffold to be secure, yet when weight was applied it gave way, they might regard it little better than a trap well calculated to produce serious injury. Under such circumstances, an act which in itself might be lawful would, by the manner in which it was executed, become unlawful and subject the parties to damages."

§ 221. **Duty to look out for trespassers.** Whether the occupier of land is under any duty to look out for trespassers while changing or when about to change the condition of the premises seems to be an unsettled question. The point has generally been raised in cases where a trespassing person or animal has been injured by a railroad train. The better view is that the land occupier does owe such a duty, where trespassing has been so frequent in the past as to make it likely that trespassers will be on the land.

In Cincinnati etc. Railroad Co. v. Smith (3) the action was brought to recover the value of two horses alleged

(3) 22 O. St. 227.

to have been killed through the negligence of the servants of the defendant railroad company in operating one of its trains. The court held that the defendant was under a duty to look out for trespassing animals on a track, saying: "If the servants of the company in charge of the train, having due regard to their duties for the safety of the persons or property in their charge, could, by the exercise of ordinary care, have seen and saved the horses, we think they were bound to have done so."

§ 222. **The turntable cases.—Duty of land occupiers toward children.** While as has just been seen the land occupier owes no duty of care toward trespassers to keep premises in repair or to warn of perils, an exception has been made in some jurisdictions where the trespassers are small children. Since many of the cases where the question has arisen have been those of railroad turntables the cases are frequently called the "turntable cases".

In Frost v. Eastern Railroad (4) the defendant's turntable was situated on the defendant's land about sixty feet from the public street; the plaintiff, a boy of seven, was attracted to the turntable by the noise of older and larger boys turning it and playing upon it. The court held that the plaintiff was not entitled to recover for injuries suffered while playing upon the turntable, saying: "The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not have the effect to raise a duty where none otherwise exists. The supposed duty has regard to

(4) 64 N. H. 220.

the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must as a rule have reference to all classes alike."

In Keffe v. Milwaukee & St. Paul Railway Co. (5) the plaintiff, a boy of seven, was injured by playing upon the defendant's turntable which was located in an open space near the defendant's passenger depot, and not fenced or guarded in any way; the turntable thus located was very attractive to young children. The defendant was held under a duty to the plaintiff on the ground that the child did not occupy the position of an ordinary trespasser. The court said: "The defendant knew that the turntable, when left unfastened, was very attractive, and when put in motion by them, dangerous, to young children, and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for he cannot blame them for not resisting the temptation it has set before

(5) 21 Minn. 207.

them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves."

If as a matter of fact the defendant did allure the children upon the turntable, it is obvious that it ought to be held liable. The decision, however, has been followed in cases where there were no allurements and where the children were regarded as trespassers. If such a burden is laid upon the land owner, it certainly ought to be limited to cases where he had reasonable cause to believe that the dangerous object would attract the children and that it was likely to do substantial harm to them; he ought not to be held liable where the land is left in its natural condition, but only where he has brought something on the land.

B. Duty of care toward persons using an adjacent public way.

§ 223. **Statement of the rule.** In Barnes v. Ward (6) action was brought for wrongfully causing the death of one Jane Barnes. The defendant had made an excavation near a public way in the process of building a house. The deceased on a dark night wandered from the way, fell into the excavation and was killed by the fall. The defendant contended that since the hole was on his own land, he was under no duty to fence it. The court held, however, that he was under such a duty, because of the nearness of the way it interfered with the safety of it.

(6) 9 C. B. 392.

In a Connecticut case (7) it was held that the test was not the number of feet distant, but whether the excavation was so near the highway as to cause substantial danger to careful travelers.

C. Duty of care toward licensee.

§ 224. **Who is a licensee?** A licensee is a person who is upon the premises of another with the permission of the latter. This permission may be express, or it may be implied by circumstances. If A repeatedly crosses B's land with B's knowledge, and B does not object to it, a license or permission may be implied. The difference between a trespasser and a licensee under such an implied license is one of degree, and it may be very difficult in a particular case to decide whether the plaintiff was the one or the other.

§ 225. **Duty toward a licensee.** Whatever duty is owed by a land occupier to a trespasser is of course owed to a licensee. He is, besides, under a further duty of warning the licensee of perils or dangers on the premises, provided: (a) the land occupier knows of them; (b) the licensee does not know of them; and (c) the ignorance of the licensee is known or should be known to the land occupier. There is, apparently, no duty to keep the premises in repair or to use care to find out the existence of danger.

In Campell v. Boyd (8) the defendant was the owner of a mill at the head of a creek; a few yards below the mill

(7) Norwich v. Breed, 30 Conn. 535.

(8) 88 N. C. 129.

the creek divided into two separate streams. Along its course on either side were two parallel public roads each two miles distant. The defendant, with others, opened a way connecting the two public roads and crossing both streams; over the streams they constructed bridges. While this direct route was opened for the convenience of the defendant and his associates, whose land was traversed, it was also used by the public, with full knowledge of the defendant, and without objection from anyone. About six years after the way was opened the plaintiff, with his horse, while in the use of this connecting way and passing one of the bridges, broke through and was precipitated into the creek. The flooring of the bridge was sound and there was no visible indication of weakness or decay to put a person passing over it on his guard. But the timbers underneath and hidden by the floor were in a rotten and unsound condition, and of this the defendant had full knowledge before the disaster. He was at his mill and saw what occurred, and going up to the place remarked to the plaintiff that when he saw him about to enter the bridge he thought of calling him to stop but did not do so; that the bridge was unsafe, and he regretted that he did not stop the plaintiff from crossing. The defendant was held liable. In its opinion the court spoke of the duty to repair the bridge being upon the defendant. What was meant, of course, was that as long as the defendant kept the way open he was under a duty either to repair or to warn of the hidden danger of which he knew. A warning posted conspicuously at each end of the bridge and a lantern placed there

at night would probably have been sufficient to relieve the defendant.

D. Duty of care toward a business visitor.

§ 226. **Who is a business visitor?** Business visitors are those who come upon the premises at the express or implied invitation of the occupier on business which is or may be of pecuniary interest to the occupier. The most common illustration is that of a person who enters a store for the purpose of buying goods which the storekeeper has for sale, but the term is by no means limited to such instances. Thus in Indermaur v. Dames (9) the court said: "The common case is that of a customer in a shop, but it is obvious that this is only one of a class; for whether the customer is merely chaffering at the time, or actually buys or not, he is, according to undoubted authority entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know. This protection does not depend on the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there at the invitation of the shopkeeper, and as much entitled to protection during

(9) L. R. 2 C. P. 274.

this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was."

A pedlar would not usually be a business visitor because usually there is no implied invitation. The same is true of a tramp or beggar. They are usually not even licensees, but mere trespassers.

§ 227. **Duty toward a business visitor.** The land occupier is under a duty to warn not only of the perils of which he knows—as in the case of the licensee—but of those of which he ought to know; that is, he is under a duty to use care to discover hidden dangers.

In Indermaur v. Dames (10) the defendant was occupying a high building used as a sugar refinery, in the interior of which was a shaft or chute passing from the basement of the building upwards through the several floors; this shaft was highly dangerous to persons entering the building who were not acquainted with it, since it was left without a fence or guard of any kind. The plaintiff being unacquainted with the premises, was employed by the defendant to enter the building and do certain work in his trade as a gas-fitter, after darkness had set in, in the evening. In returning from fetching some of his tools from another part of the building the plaintiff walked into the shaft without perceiving it in the darkness, and fell thirty feet, receiving the injuries sued for. The jury found that the plaintiff was not negligent and gave him their verdict. The court held that the defendant was properly held liable since the plaintiff had

(10) L. R. 2 C. P. 274.

the rights of a business visitor. The defendant here knew of the danger, and hence would have been liable to a mere licensee, but the court would have held him liable even if he had not known, if the danger was such that he could have found it out by the exercise of ordinary care.

E. Duty toward those invited not on business.

§ 228. **English view.** In England one who has been invited, but is not a business visitor, seems to have no greater rights than a licensee. In Southcote v. Stanley (11) the defendant was the occupier of a hotel; the plaintiff came upon the premises as a social visitor by the invitation of the defendant, and, as he was about to leave, a large piece of glass fell out of the door upon him and injured him. The court held that the defendant was not liable because while remaining as a visitor he was in the same position as any other member of the establishment, so far as regards the negligence of the master or servants and must take his chance with the rest. Though the reasoning of the case is not sound, the decision may be supported upon the ground that the plaintiff was only entitled to the rights of a licensee, and there was nothing to show that the defendant knew of the danger.

§ 229. **American view.** In this country what little authority there is seems to give to the person invited not upon business the same rights as those who are business visitors. In Davis v. Central Congregational Society (12)

(11) 1 Hurlstone & Norman, 247.
(12) 129 Mass. 367.

the plaintiff attended, in response to a general invitation, a religious meeting in the defendant's house of worship, and on leaving at its close was injured in passing to the street by falling over a wall by the side of a passageway leading from the street to the front entrance of the church. In discussing the duty which the defendant owed to the plaintiff the court said: "The application of the rules upon which the defendant's liability depends is not affected by the consideration that this is a religious society, and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff comes by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that, too, although the defendant in giving the invitation was actuated only by motives of friendship and Christian charity."

CHAPTER VII.

LIABILITY FOR ACCIDENT.

Section 1. In General.

§ 230. Use of the term accident. In popular usage the term accident does not necessarily negative the existence of negligence. Thus we speak of a railroad accident without reference to whether it was caused by negligence of the servants of the railroad company or whether it was unavoidable. This usage has also received judicial sanction in several cases. The term is, however, also used in the sense of "inevitable accident"; that is, a non-negligent occurrence, and for the sake of brevity and convenience, the term accident is thus used in this article. See § 7, above. Moreover, the term accident does not indicate the cause of the occurrence. It thus covers cases where the defendant did and cases where he did not cause the plaintiff's damage.

§ 231. Liability for accidents due to unlawful acts. In § 45, above, it was pointed out that the defendant is liable for an accident caused by him while engaged in an unlawful act, for example, a breach of peace. The reason for this is that although a defendant is generally not liable for accident, the law properly places upon him the risk of causing accidental loss while thus violating the criminal law.

§ 232. **Liability of an intermeddler for accidents.** Where one is wrongfully in the possession of another's goods he is probably liable as an insurer for any accident that may happen to the goods, whether caused by himself or not. A common illustration of this is the liability of a bailee of a horse who violates the terms of the bailment by driving the horse further than his license allows, or by driving the horse too fast; in such a case the bailee or hirer of the horse is liable if the horse should accidentally break his leg while the unlawful possession continues. These cases were discussed in § 129, above, in the chapter on Conversion, because the action of trover has been generally allowed on such a state of facts.

Section 2. Liability for Fire and Explosives.

§ 233. **Liability for fire.** By the old common law a person who kindled a fire was absolutely liable to others whose property was injured by such fire spreading, and besides there was a presumption that a fire originating upon a man's premises was kindled by him or his servants. This presumption was later removed by a statute in England, but the absolute liability probably remains. In America, however, the law of England on this point has not been generally followed. In Dean v. McCarty (1) the defendant was clearing his land and had set fire to his log heaps at a favorable time; but, a high wind springing up, the fire unfortunately spread, running through the grass notwithstanding such efforts as could be used to stop it, and some cord wood and rails belong-

(1) 2 Upper Canada Queen's Bench, 448.

ing to the plaintiff were destroyed. The jury found that the defendant was not negligent. The plaintiff contended that since the defendant had kindled the fire for purposes which were beneficial to himself, he ought to be held liable even though not negligent. The court refused to sustain this contention, saying: "A man may have a very valuable mill, and a neighbor, having a small piece of wood adjoining to it of trifling value when compared to the mill, in the process of clearing sets fire, which, unfortunately, by a sudden rise or change of wind spreads so as to consume the mill, in spite of all the exertion that can be used. It may be said here is a case in which one of two innocent men must bear a serious loss, and that the misfortune would more properly fall upon the one who was the voluntary agent in setting the cause in motion, than upon the one who had no share whatever in producing it. Still, I apprehend that such a case must go to the jury, like all other cases of the kind upon the question of negligence. If the principle is a sound one it must be applied throughout; though indeed it might seem reasonable, where very valuable property might be endangered, to apply an extraordinary degree of caution and diligence; but that consideration would only affect the determination of the jury upon the facts of what was reasonable care under the circumstances. We must consider, on the other hand, in examining the soundness of what we have shown to be the principle, what would be the state of things if the person kindling the fire were to be inevitably and in all cases liable for the consequences. It is not very long since this country was

altogether a wilderness, as by far the greater part still is. Till the land is cleared it can produce nothing, and the burning of the wood upon the ground is a necessary part of the operation of clearing. To hold that what is so indispensable, not merely to the individual interest, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which in other businesses of mankind is plainly settled and always upheld."

§ 234. **Plaintiff must prove negligence.** In Bachelder et al v. Heagan (2) the question was raised as to whether the burden of proof as to negligence in kindling and keeping a fire was upon the plaintiff or whether the defendant must show that he used due care. The court said: "Negligence or misconduct is the gist of the action, and this must be proved. In ordinary cases, of which the one before us is not an exception, where the action depends on negligence, the burden of proof is upon the plaintiff."

In actions against railroad companies for damages caused by fire issuing from their engines, some jurisdictions have held that the burden is upon the defendant of disproving negligence. This is largely upon the ground that what evidence there is is usually in the possession of the defendant. Many states have passed statutes to this effect. The almost universal custom of insuring against loss by fire makes the subject of accidental loss

(2) 18 Maine, 32.

by this cause of less importance than it otherwise would be.

§ 235. **Liability for dangerous explosives.** Liability for accidental loss caused by dangerous explosives seems to depend much upon the circumstances, such as the need of explosives in the community, the proximity to dwellings, and the amount stored by the defendant. In Heeg v. Licht (3) action was brought to recover damages for injuries to the plaintiff's building alleged to have been caused by the explosion of the powder magazine on the premises of the defendant. The trial court had charged the jury that the defendant was not liable unless he carelessly or negligently kept the gunpowder upon the premises. The upper court held that this was not correct, saying: "The keeping or manufacturing of gunpowder or fire works does not necessarily constitute a nuisance in itself. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar it should have been left for the jury to determine whether from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion."

After citing several cases of such nuisances as carrying on a noxious trade or business, and a few cases holding the defendant liable for damage caused to his neighbors for blasting rocks on his own land with gun powder, the

(3) 80 N. Y. 579.

court continued: "Most of the cases cited rest upon the maxim 'so use your own property as not to cause damage to the property of others;' and where the right to the undisturbed possession and enjoyment of property comes in conflict with the right of others, it is better, as a matter of public policy, that a single individual should surrender the use of his land for special purposes injurious to his neighbors or others, than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss, and injury, which might result if the rights of the former were without any restriction or restraint. The keeping of gun powder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling houses or the persons of those dwelling in close proximity, we think, rests upon the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbors, than he is authorized to engage in any other business which may occasion serious consequences."

Section 3. Liability of Owner or Keeper of Animals.

A. Trespass by animals on land.

§ 235a. **General rule.** The general rule is that if A's cattle stray from A's land over upon the land of B, A is liable irrespective of negligence. The rule comes from early times when the controlling principle was that the one who had suffered damage ought to be recompensed without reference to the culpability of the other

party. The rule has worked well, however, and with an exception to be noted later, it has never been changed. In Noyes v. Colby (4) the defendant pastured his cow in a pasture belonging to one M, and one Heath also pastured his cow in the same inclosure. One evening when he drove home his own cow he also let the defendant's cow out of the pasture. He did this without the knowledge or consent of the defendant and without any authority, had never done so before, and after this transaction was requested by the defendant not to do so again. He drove the cow down the road until within about 200 feet of the plaintiff's land, when she strayed along the road and trespassed upon the plaintiff's premises. The defendant contended that he was not liable since Heath had no authority to turn the cow loose upon the highway, and the lower courts sustained this contention. But the upper court held that this was wrong, saying: "It appears distinctly that the animal, although driven by Heath some distance from the pasture in the direction of the plaintiff's land, was not driven upon it so as to be in his hands a mere instrument for committing a trespass. Heath's trespass was upon the chattel of the defendant, but not upon the soil of the plaintiff. He abandoned the cow, and she being no longer in his custody 'strayed', and involved the owner in consequences ordinarily incident to permitting beasts to stray into the enclosures of others. When Heath abandoned the cow, she was about twelve rods from the land of the plaintiff. From that period she was no longer under the control of Heath, but was

(4) 30 N. H. 143.

again in the legal possession of the defendant, and under his general custody and control; and like other owners, having the care and custody of their beasts at the time, he is answerable in trespass for her acts in straying upon the close in question and grazing there."

The owner or keeper is thus held liable for the trespass of his domestic animals just as if he had himself trespassed; hence he may be held liable for nominal damages if no actual damage is shown.

§ 236. **Cattle driven on a highway.** If the defendant was lawfully driving the cattle along the highway, the rule of liability at peril does not apply. In Tillett v. Ward (5) an ox of the defendant was being driven from the live stock market along a public street to the defendant's premises. When the ox came opposite the plaintiff's shop, it passed through the open doorway into the shop and damaged the plaintiff's goods. There was no negligence on the part of the defendant. The court held that the defendant could not be held liable, Stephen, J., saying: "As I understand the law, when a man has placed his cattle in a field it is his duty to keep them from trespassing on the land of his neighbors, but while he is driving them upon a highway he is not responsible, without proof of negligence upon his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of Goodwin v. Cheveley (6) seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence

(5) L. R. 10 Q. B. D. 17.
(6) 28 L. J. (Ex.) 298.

when the injury is done to property adjoining the highway—an exception which is absolutely necessary for the conduct of the common affairs of life. We have been invited to limit this exception to the case of highroads adjoining fields in the country, but I am very unwilling to multiply exceptions, and I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town."

Further reasons for the distinction are that in a case like Tillett v. Ward it is easier to prove negligence than when an animal has escaped from a pasture; and besides, less damage is likely to happen because the presence of the animal upon the plaintiff's land is almost certain to be known at once.

§ 237. **Liability for trespassing dogs or cats.** The rule of liability at peril which applies to cattle does not extend to dogs or cats. The reasons given for this exception may be thus summarized: (1) The difficulty or impossibility of keeping these animals under restraint; (2) the slightness of the damage which their wandering ordinarily causes; (3) the common usage of mankind to allow them a wider liberty. Another reason may be added in the case of dogs which is of much less weight than formerly—the need of dogs for protection and the impossibility of getting that protection unless the animals are allowed a wide liberty.

In addition to cattle the general rule has been applied to horses, hogs, sheep, and geese; it is perhaps not applicable to bees.

§ 238. **The law in prairie states.** In jurisdictions where

in pioneer days there were few inhabitants, and no fences for lack of material out of which to make them, the English common law rule was held inapplicable. In Seely v. Peters (7), an early Illinois case, the court said: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely ill adapted to a new country like ours. If this common law rule prevails now, it must have prevailed from the time of the earliest settlement of the state, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they brought with them and adopted as applicable to their condition, a rule of law requiring each one to fence up his cattle? That they designed the millions of fertile acres stretched out before them, to go ungrazed, except as each purchaser from the government was able to enclose his part with a fence? This state is unlike any of the eastern states in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced; and their luxuriant growth, sufficient for thousands of cattle, must be suffered to rot and decay where it grows, unless settlers upon their borders are permitted to turn their cattle upon them. Perhaps there is no principle of the common law so inapplicable to our country and the people as the one which is sought to be enforced now, for the first time, since the settlement of the state. It has been the custom of Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to

(7) 5 Gilman (Ill.) 130.

run at large. Settlers have located themselves contiguous to prairies, for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon unenclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of fences through which their stock have broken; and never till now has the common law rule that the owner of cattle is bound to fence them up been suffered to prevail or to be applicable to our condition."

This rule, of course, did not give the owner a right to have his cattle stay upon his neighbor's land; the neighbor could drive them off or fence them off; the effect of the rule is that instead of the owner of cattle being compelled to fence his cattle in at his peril, the burden was upon the owner of a crop to fence it to protect it from straying animals.

In 1874 the common law rule was re-enacted by statute in Illinois, giving, however, the option to counties to retain the rule then in force. In 1895 the common law rule was adopted absolutely, the reasons for the other rule having disappeared when the prairies were settled. The same development of the law has taken place in several states of the Mississippi valley.

§ 239. **Liability for cattle in possession of agister.** Where the owner of cattle has put them into the hands of an agister (cattle pasturer) and they escape into the neighbor's field, the question is raised as to whether the absolute liability is placed by the law upon the agister, or

upon the owner, or upon both. It seems fairly clear that the agister is liable, but whether the owner is liable at his peril in such a case seems to be a disputed point. In Rossell v. Cottom (8) the court said: "The law raises a duty on the owner to guard against the trespasses of animals prone to commit them. This is undoubted as to the absolute owner; nor does it seem to be doubted as applicable to the qualified owner in possession. But the point of the argument is that either may be made liable in trespass for the depredation of agisted cattle. This cannot be maintained by any legal logic. The reason of liability in such cases arises out of the legal requirements to take the necessary care and control of them, so as to prevent injury, which implies not only the duty, but the right of control. The law must not be so administered as to destroy the relation altogether. And would not this follow, if I must answer in trespass if my horse, being hired or loaned, break into the field of another while in the custody of the hirer or borrower; or my agisted cattle committed trespass while under the control of the agister? While in his custody and in his enclosures how can I control them? I could not enter upon his premises to do so without myself becoming a trespasser; and for omitting to do so the principle contended for would make me a trespasser for injuries done by them."

On the other hand in Blaisdell v. Stone (9) the court said: "It may be reasonably necessary that the risk of entrusting the cattle to an irresponsible bailee should so

(8) 31 Pa. St., 525.

(9) 60 N. H. 507.

rest upon the owner as not to deprive injured persons of the common law action, if the bailee is unable to pay the damages. The ancient rule that the injured party may, at his election, maintain trespass against the owner or his bailee is not so clearly devoid of modern reason as to require a decision that it has ceased to exist."

B. Damage by animals other than trespass on land.

§ 240. **Liability for undomesticated animals.** The general rule is that if one keeps a wild animal which is likely to do damage if it escapes, he is liable at his peril if it does escape and cause damage. In Filburn v. People's Palace and Aquarium Company (10) action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendant and was being exhibited by them. The contention made by the defendant was that this particular elephant was domesticated and that therefore the defendant should not be absolutely liable without proving that he knew of the vicious propensity of the animal to attack people. The court refused to sustain this contention, saying: "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which according to the experience of mankind, is not dangerous and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep

(10) L. R. 25 Q. B. D. 258.

such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its vicious propensities."

§ 241. **Liability for domesticated animals.** In accord with the opinion of the court in Filburn v. People's Palace and Aquarium Company, one who keeps a domesticated animal or one that is harmless by nature such as a deer, rabbit, and so forth, is not liable at his peril unless he knows its dangerous tendency. Thus in Mason v. Keeling (11) where the defendant's dog had worried and bit the plaintiff as the latter was peaceably going about his business upon a public highway, the court held that the defendant was not liable since it was not shown that the defendant knew of any vicious propensity, and the court took judicial notice that a dog was not naturally a fierce animal.

This rule of the common law has been thought too lenient in recent years with reference to liability for dogs, and by statutes in many states owners are held liable at their peril though they had no knowledge of the vicious propensity; in some states the owner is made liable in double damages.

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(11) 12 Modern, 332.

The common law rule is not followed in Scotland with reference to any animals the court saying (12): "It has been urged that the owner's knowledge of the vicious propensities of the dog is requisite to make him civilly responsible, and that he is not liable for damage done by the animal unless such knowledge be proved; but I think that the argument to which I have just now adverted is quite absurd. The vicious tendency of the animal never can be known until some mischief is done; so the result of the argument would be that every dog is entitled to have at least one worry and every bull one thrust, without rendering its master responsible. It may be that such is the law of England, and it rather appears that they have in that country an unbounded toleration for a first offense. But, in the law of Scotland, it is no matter if the animal belonging to the defender, and committing an injury, have four legs or only two. Suppose my coachman, a person in whose skill and care I have from long experience unbounded confidence, drives my carriage over a child, will it be any defence to me that he never did it before?"

§ 242. **Liability for incidental damage caused by trespassing domesticated animals.** In Decker v. Gammon (13) the defendant's horse had escaped during the night from the defendant's enclosure or from the highway on to the plaintiff's land and severely injured the plaintiff's horse. The defendant was of course liable for any damage to the land, but the question was raised as to whether

(12) 2 MacQueen's (Scotch) House of Lords, 25.

(13) 44 Maine, 302.

he was liable for the injury to the horse where he did not know of the vicious propensity. The court held that the defendant was so liable, saying: "The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind, the ground of the action is that the animals were wrongfully in the place where the injury was done. And it is not necessary to prove any knowledge on the part of the owner that they had previously been vicious." The point cannot, however, be considered well settled.

§ 243. **Sufficiency of notice to charge the defendant.** In Reynolds v. Hussey (14) the defendant's horse injured the plaintiff by striking him with his forefeet. The defendant knew that the animal was a vicious kicker, but did not know that he ever struck with his forefeet; he contended that this was not sufficient to make him liable at his peril. The court refused to sustain this contention, saying: "It is not necessary that the vicious acts of a domestic animal brought to the notice of the owner should be precisely similar to that upon which the action against him is founded. If it were, there would be no actionable redress for the first injury of a particular kind by such an animal because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity. Neither is it necessary, in order to fasten a liability upon the owner, that he have notice of a previous injury to others. It is the propensity

(14) 64 N. H. 64.

to commit the mischief that constitutes the danger, and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. The question in each case is, whether the notice was sufficient to put the owner upon his guard, and to require him as an ordinarily prudent man, to anticipate the injury which has actually occurred. Hence it is unnecessary to prove more than that he has good cause for supposing that the animal may so conduct itself. And a good cause for so supposing in the present case was the defendant's knowledge that the animal was of a vicious disposition and a notorious kicker; and the jury might well conclude from these undisputed facts alone that the defendant had sufficient knowledge of its vicious nature and propensity to make him liable for its subsequent attack upon the plaintiff in consequence of that nature and propensity."

In Cox v. Burbidge (15) the plaintiff, a child of tender age, while lawfully upon the highway was kicked by the defendant's horse which was straying there. In holding that the defendant was not liable the court said: "It appears that the horse was on the highway, and, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of the animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries

(15) 13 Common Bench, New Series, 435.

sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless this knowledge can be proved. This is a very familiar doctrine; and it seems to me that there is much stronger reason for applying that rule in respect to the damage done here. The owner of a horse must be taken to know that the animal will stray if not properly secured and may find its way into the neighbor's corn or pasture. For a trespass of that kind, the owner is of course responsible. But if the horse does something which is quite contrary to his ordinary nature—something which his owner has no reason to expect he will do—he has the same sort of protection that the owner of a dog has; and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway."

Section 4. Damage by Water

§ 244. Doctrine of Fletcher v. Rylands. In Fletcher v. Rylands (16), a case decided by the House of Lords in 1868, an attempt was made to generalize from the liability for nuisances, explosives, and trespassing animals. In that case the defendant made a reservoir on his own land and filled it with water. The water passed down old mine shafts on the defendant's land through old mine workings and under intermediate land, and reached the plaintiff's mine causing him much damage. The court held that the defendant was liable in trespass without proof of negligence, saying: "We think that the true rule of law

(16) L. R. 3 H. L. 330.

is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.... The general rule, as above stated, seems on principle just. The person whose grass is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be law, whether the things so brought be beasts, or water, or filth, or stenches....The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used;

and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. . . . If the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in it or upon it, for the purpose of introducing the water either above or below ground in quantities and in a manner not the result of any work or operation upon or under the land; and if in consequence of their doing so, or in consequence of the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril."

§ 245. **Criticism of Fletcher v. Rylands.** The case has been much cited in the United States but rarely followed. Even in England the courts in later cases have managed to distinguish them from it upon some ground. Thus in Nichols v. Marsland (17) the defendant was held not liable because the water was caused to overflow and flood the plaintiff's land by an extraordinary rain. In Box v. Jubb (18) the overflow was caused by a third party emptying a large quantity of water into the defendant's

(17) L. R. 2 Exch. D. 1.

(18) L. R. 4 Exch. D. 76.

reservoir; it was held that the defendant could not be liable, there being no negligence.

In some jurisdictions in this country, the doctrine of Fletcher v. Rylands has been definitely repudiated. In Marshall v. Welwood (19) the boiler of a steam engine exploded on the defendant's property and damaged the adjoining property of the plaintiff. The plaintiff contended that the defendant should be held liable irrespective of negligence. The court refused to sustain this contention, saying: "The principle (referring to the doctrine of Fletcher v. Rylands) would evidently apply to, and rule the present case; for water is no more likely to escape from a reservoir and do damage than steam is from a boiler; and, therefore, if he who collects the former force on his property and seeks, with care and skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. The fallacy of the process of argument by which the judgment is reached in the case of Fletcher v. Rylands appears to me to consist in this: That the rule mainly applicable to a class of cases which, I think, should be regarded as, in a great degree, exceptional is amplified and extended into a general, if not universal, principle. The principal instance upon which reliance is placed is the well-known obligation of the owner of cattle, to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect that the owner must take charge of his cattle at his

(19) 38 N. J. Law, 339.

peril, and if they evade his custody he is, in some measure, responsible for the consequences. This is the doctrine of the Year Books, but I do not find that it is grounded on any theoretical principle, making a man answerable for his acts or omissions, without regard to his culpability. That in this particular case of escaping cattle so stringent an obligation upon the owner should grow up, was not unnatural. That the beasts of the landowner should be successfully restrained, was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the unnegligent owner rests in dicta, and not in express decision. But waiving this, there is a consideration which seems to me to show that this obligation which is put upon the owner of errant cattle should not be taken to be a principle applicable, in a general way, to the use or ownership of property, which is this: That the owner of such cattle is, after all, liable only, under this rule, for the injury done by them; that is, he is responsible, with regard to tame beasts who have no exceptionally vicious

disposition so far as is known, for the grass they eat, and such like injuries, but not for the hurt they may inflict upon the person of others—a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, and in an indirect manner, ill results which disastrously affect innocent persons. . . . If the steam engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travellers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains."

§ 246. **Same: Brown v. Collins.** In Brown v. Collins (20) the defendant's horses became frightened by a railroad engine, became unmanageable, and ran against a lamp-post upon the plaintiff's land and broke it. The plaintiff contended that the defendant should be held liable though he was not negligent in the management of his horses. The court refused to hold the defendant responsible, saying with reference to the doctrine of Fletcher v. Rylands: "This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the

(20) 53 N. H. 442.

defendant. . . . Everything that a man can bring on his land is capable of escaping—against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art—and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things; it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential element of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty carefully to do. The distinction made in Fletcher v. Rylands between a natural and non-natural use of land, if by it is meant anything more than the difference between a reasonable use and an unreasonable one, is not established in law. Even if the arbitrary tests were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened

spirit of the common law; it would impose a penalty upon efforts made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement."

CHAPTER VIII.

DEFAMATION.

Section 1. In General.

§ 247. **Protection to right of reputation.** The right protected by the law of defamation is the right of reputation. The right of security of reputation is an intangible one as compared with the rights of security of person and property already discussed; causing damage to one's reputation may therefore be called a non-physical as distinguished from a physical tort. One's reputation depends upon the opinion which other persons entertain of his character. One's reputation is therefore damaged by communicating to the minds of third persons something which is disparaging. No action will lie, however, unless the matter so communicated is untrue.

§ 248. **Definition of defamation.** A statement or other communication to the mind of another is defamatory of a person if it: (a) holds him up to hatred, contempt, disgrace, or ridicule; or (b) tends to injure him in his office, business, trade, or profession.

§ 249. **Forms of defamation: Slander and libel.** Slander is, generally speaking, oral defamation; it includes, however, all defamation in temporary, fugitive form; for example, hissing an actor, if defamatory, would be slander; so, imitating another's walk, or conveying ideas by gestures, if defamatory, would be slander.

Libel is, generally speaking, written or printed defamation; it includes, however, all defamation in permanent form, such as painting, caricature, effigy or emblem. For example, leaving a gallows in one's doorway, if defamatory, would be libel.

A libel may thus be produced without being communicated. Slander, on the other hand, can hardly be said to have any existence unless it is communicated to the mind of another. Talking to one's self would not only not be communication, but it would not be slander. Writing a letter, however, is really the production of a libel, though no action will lie, till it is communicated.

Section 2. Publication or Communication.

§ 250. Communication to the plaintiff himself not sufficient. The word "publication" is used in this chapter not in its ordinary sense of communication to the general public, but in the sense of communication to anyone other than the plaintiff. Communication to the plaintiff is not sufficient. Thus in Clutterbuck v. Chaffers (1) it appeared that the defamatory letter in question was delivered to the plaintiff and that no one else read the letter. It was held that the plaintiff was not entitled to recover. The reason for this is that the plaintiff's opinion of himself is no part of his reputation. The criminal law, however, punishes the sender in such a case, because the communication of defamatory matter to the plaintiff tends to a breach of the peace.

§ 251. What is a communication? In Snyder v. An-

(1) 1 Starkie, 471.

drews (2) the defendant, before sending the defamatory letter in question to the plaintiff, read the letter to one X. This was held to be a publication of the letter and therefore an action for libel lay. Logically, however, it would seem that since X did not read the letter, but merely heard the defendant speak some defamatory words purporting to be written in the letter, it should have been held slander rather than libel.

In Delacroix v. Thevenot (3) a defamatory letter was sent by the defendant to the plaintiff. It was opened by the plaintiff's clerk who was in the habit of opening all of the plaintiff's letters which were not marked "private;" there was evidence tending to show that the defendant knew of this habit of the clerk. The court held that there was sufficient evidence for the jury to consider whether the defendant intended the letter to come into the hands of the third person. The jury found a verdict for the plaintiff.

For a great many purposes husband and wife have been treated by the law as a single person, namely, the husband. A communication to the plaintiff's wife is, however, a publication. A communication to the defendant's wife, on the other hand, is not enough to make the defendant liable. The real reason for this is that the relation between husband and wife is so close that such a communication is privileged on the ground of public policy.

In Sheffill v. Van Deusen (4) the defamatory words

(2) 6 Barbour, 43.
(3) 2 Starkie, 63.
(4) 13 Gray, 304.

were uttered in a public place, but it was not shown that they were heard by any third person. This was held not to be sufficient.

So, if the defamatory words were spoken to some one who was deaf, or who did not understand the language, or if a defamatory letter were opened by some one who could not read it, there would be no publication.

Where a defamatory letter was written and sent to the plaintiff by two persons, each was held liable for libel, because there was a communication each to the other (5).

§ 252. **Must the publication be intentional?** It is sometimes said that defamation is a wilful tort. This does not seem to be true, since it is held that a defendant is liable for a negligent publication, that is, where publication should have been foreseen. He is probably not, however, liable at his peril; thus if he writes a defamatory letter and locks it up in his desk and a burglar breaks open the desk and reads the letter, he would probably not be held liable.

§ 253. **Publication to the wrong person.** If the defendant sends a defamatory letter directed to the plaintiff marked "private," the reading of the letter by the plaintiff's clerk, or other person, should be excused because caused neither by intention nor negligence. On the other hand, if defendant should deliver it to X by mistake, thinking him to be the plaintiff, X's reading of it would be a sufficient publication. The defendant intended that it should be communicated to the person who received it, and mistake as to the person should not excuse. It is the

(5) Sparts v. Poundstone, 87 Ind. 522.

difference again between accident and mistake. See § 46, above.

Section 3. Libel.

§ 254. **Libel actionable without special damage.** As will be seen later, to make slander actionable special damage must be proved, except in certain cases (§§ 255-69, below). On the other hand, it is never necessary in the law of libel. The reason for this is that the law of slander grew up in the Anglo-Saxon and English courts and became settled before printing became common. When printing came, the common law of slander was found to be inadequate, and the court of Star Chamber imported the law of libel from the Roman law, making libel both a crime and a tort. After the court of Star Chamber was abolished, the English judges continued the law of libel, thus adopting it permanently into the English law.

The distinction between the legal consequences of libel and slander have been quite troublesome, and various reasons other than the historical one just adverted to have been suggested as an explanation of the distinction. In Thorley v. Lord Kerry (6) the action was for a libel contained in a letter addressed to Lord Kerry and sent open by one of the servants who became acquainted with its contents. The letter charged Lord Kerry with being a hypocrite and using the cloak of religion for unworthy purposes. It was held that the defendant was liable without proof of special damage, the court saying: "There is no doubt that this was libel, for which the defendant

(6) 4 Taunton, 355.

might have been indicted and punished; because, though the words imputed no punishable crimes, they contain that sort of implication which is calculated to vilify a man, and bring him as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies. . . .The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken. For myself I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises upon them of bringing an action. For the defendant it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles II's time, and the difference has been recognized for at least a century back. . . . In the arguments both of the judges and counsel, in almost all the cases in which the question has been whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of malignity, but for the damage sustained. So

it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable, but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. . . . If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken."

Section 4. Slander.

§ 255. **Defamatory statements actionable per se.** There are three classes of defamatory statements which are actionable per se (in themselves); that is, without proof of special damage. These are: words imputing crime, words disparaging a person in his trade, business, office, or profession, and words imputing a loathsome disease. Special damage is not required to be shown, probably because these are among the most serious charges that can be made; the law allows the plaintiff to sue at once without making sure that he can prove damage, and thus gives him better legal protection.

A. Words imputing crime.

§ 256. **Meaning of crime.** Though all jurisdictions agree that statements charging a crime are actionable without proof of special damage, there are various divergent views as to the meaning of "crime" in this connec-

tion. The English law (7) is that the crime must be punishable corporally and not merely by a fine, but that it need not be indictable; hence a defendant who spoke of and to the plaintiff: "I will lock you up in Gloucester gaol next week. I know enough to put you there," was held liable without proof of special damage.

On the other hand, the prevailing view in the United States requires that the offence be an indictable one, involving moral turpitude or subjecting the offender to infamous punishment. Hence in Brooker v. Coffin (8) the charge "she is a common prostitute, and I can prove it," was held not actionable per se, since common prostitutes were not liable to indictments.

§ 257. **Present liability to punishment not essential.** In Fowler v. Dowdney (9) the alleged slander of the plaintiff was "he is a returned convict." The court held that the words were actionable in themselves, saying: "My opinion is that these words are actionable, because they impute to the plaintiff that he has been guilty of some offence for which parties are liable to be transported. That is, I think, the plain meaning of the word; they import, to be sure, that the punishment has been suffered, but still the obloquy remains."

If the defendant should say of a child nine years old, "she is a thief," the words are actionable in themselves; a child of nine may commit larceny, though the criminal law may not punish for it (10).

(7) Webb v. Beavan, 11 Q. B. D. 609.

(8) 5 Johnson, 188.

(9) 2 Moody v. Robinson, 119.

(10) Stewart & Howe, 17 Ill. 71

§ 258. **Construction of words used.** The use of such words as "thief," and "steal," do not necessarily impute a crime. Thus in Hankinson v. Bilby (11) the defendant, in the presence of several persons charged the plaintiff with being a thief. He did not, however, intend to charge the plaintiff with being a felon. The court said: "The witness appears to have been well acquainted with the affair to which the words related. If the bystanders were equally cognizant of it, the defendant would have been entitled to a verdict; but here the only question is, whether the private intention of a man who utters injurious words is material if bystanders may fairly understand them in a sense and manner injurious to the party to whom they relate, e. g., that he was a felon..... Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject."

In McGilvray v. Springett (12) the defendant said to the plaintiff in the hearing of several persons, "You stole the town's money and they caught you at it and made you pay it back." The defendant meant to charge that the plaintiff had presented a fraudulent bill and all the hearers so understood it. Since this was not a crime within the definition laid down in that jurisdiction with reference to the law of slander, the words were held not

(11) 16 Meeson & Welsby, 442.

(12) 68 Ill. App. 275.

actionable per se. So if the words had been spoken in jest and had been so understood by all the hearers, no action could have been maintained.

§ 259. **Words spoken by an insane person.** While an insane person is not, on account of his insanity, excused for his torts, and is therefore liable generally for defamation, yet the defamatory charge spoken by an insane person is not actionable, if all the hearers knew of his insanity (13).

§ 260. **Charge of unchastity.** Since at common law unchastity was not a crime, a charge of unchastity was not in itself actionable, but required proof of special damage. This has been changed now in England and most states of this country with reference to females; in some states the statutes include charges of unchastity in case of males also.

B. Words disparaging a person in his trade, business, office or profession.

§ 261. **In general.** Defamatory charges of this sort may be either that the plaintiff lacks an essential requisite with reference to his trade, business, office, or profession, such as honesty, capacity, fidelity, or the like; or that the plaintiff has been guilty of actual misconduct in the course of such a trade, business, office, or profession.

§ 262. **Lack of essential requisite.** A charge of insanity is probably not actionable at all where it is not made with reference to the plaintiff's calling; it is actionable per se there because it imputes the lack of an essen-

(13) Yeates v. Reed, 4 Blackf. 463.

tial requisite for pursuing the calling. An imputation of insolvency is not defamatory generally, since it does not bring one into hatred, contempt, or ridicule, because one may lose his money by misfortune; but if it is made with reference to one who is engaged in trade or business, it is defamatory and actionable per se, because a business man must have credit to succeed in his calling.

§ 263. **Charge of actual misconduct.** It seems that the charge of actual misconduct must have close reference to the conduct of the plaintiff in his calling. In Ayre v. Craven (14) the defendant imputed adultery to the plaintiff who was a physician; the court held that the plaintiff must show in what manner the charge was connected by the defendant with the plaintiff's profession. Thus, if the adultery were charged as a violation of professional confidence, it would be sufficient; whereas, if it were charged as wholly unconnected with the plaintiff's profession, it would not be enough, without proof of special damage.

In Secor v. Harris (15) the statements were: "Dr. Secor killed my children. He gave them teaspoonful doses of calomel and they died. They died right off—the same day." The children were aged three years and a year and a half. The plaintiff was a practicing physician and had prescribed for the defendant's children. The court said: "It is certainly slanderous to say of a physician that he killed these children of such tender years by giving them teaspoonful doses of calomel. The charge,

(14) 2 Adolphus & Ellis, 2.

(15) 18 Barbour, 425.

to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession are actionable in themselves, on the ground of presumed damage." In this case the reference to the plaintiff's profession was, of course, a necessary one.

In Jones v. Littler (16) the charge made was that the plaintiff, who was a brewer, had been in a sponging house for debt during the past fortnight. In holding that the words were actionable per se, Parke, B., said: "In the case of Ayre v. Craven it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician; and it was possible that such an imputation of incorrect conduct, out of the line of his profession, might not injure his professional character. But this case is distinguishable, because here the imputation is that of insolvency which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends upon his general solvency, must be injured."

§ 264. **Where the calling is no longer followed.** Where the calling is no longer followed by the plaintiff at the time the charge is made, he cannot be defamed with reference to it; but if it be alleged in writing or print that a

(16) 7 Meeson & Welsby, 423.

retired attorney was guilty of sharp practice it would be a libel and therefore actionable per se since it charges dishonesty. If the charge had been that he was unskilful as an attorney it would probably not be defamatory at all; at least it would not come within the heading of this subsection.

C. Words imputing a loathsome disease.

§ 265. **Meaning of "loathsome disease" in this connection.** In "George, The Count Joannes," v. Burt in which an action was brought for imputing insanity, the court said: "An action for oral slander in charging the plaintiff with disease has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders" (17).

Imputation of an ordinary contagious disease such as measles would seem not enough. So to say of another that he has had a venereal disease is not enough. Hence the moral stigma is not the test, and the present law on this point would seem to be rather arbitrary.

D. Defamatory words not actionable per se, but causing special damage.

§ 266. **What amounts to special damage: Loss of marriage.** In Davies v. Gardiner (18) the plaintiff was engaged to be married to one Anthony Elcock; the defend-

(17) 6 Allen 336.

(18) Popham, 36.

ant said of her that she had had a child by a grocer in London, whereby she lost the expected marriage. The court said: "The action lies here, for a woman not married cannot by intendment have so great advancement as by her marriage, whereby she is sure of maintenance for life, or during her marriage, and dower or other benefits which the temporal law gives by reason of her marriage; and therefore by this slander she is greatly prejudiced in that which is to be her temporal advancement, for which it is reason to give her remedy by way of action at common law."

§ 267. **Same: Loss of society or mental pain not enough.** In Alsop v. Alsop (19) the defendant said of the plaintiff that he had had carnal connection with her while she was married to William Alsop, whereby the plaintiff lost the society of her friends and neighbors and became ill for a long time. This was held not enough. The result of the case would seem to require that the special damage must be more easily valued than is the loss of society of one's friends; also, that as in the case of negligent physical torts discussed in § 24, above, mental suffering is not enough.

In Davies v. Solomon (20) the plaintiff alleged not merely the loss of the society of her friends but the loss of their hospitality. The court held that this was enough, saying: "The loss of hospitality of friends is sufficient special damage to sustain an action like the present, and hospitality means simply that persons receive another

(19) 5 H. & N. 534.
(20) L. R. 7 Q. B. 112.

into their houses and give him meat and drink gratis. Perhaps such a definition may rather extend the signification of the word, but it is true in effect—for if they do not receive him, or if they make him pay for his entertainment, that is not hospitality. In Roberts v. Roberts (21) it is to be observed, that the loss suffered by the plaintiff by being excluded from a religious society was not temporal, and was therefore held not to be enough. But in the present case there is a matter of temporal damage—small though it be—alleged in the declaration. It is also argued, that inasmuch as this action is brought by the wife, the husband being merely joined for conformity, the damage necessary to give her a right to recover must be damage to her alone, and that the loss of hospitality which she has hitherto enjoyed, is only pecuniary loss to her husband, and not to her. That certainly is a plausible argument, as the husband is, of course, bound to maintain his wife and to supply her with food, although her friends cease to do so. I am, however, unwilling to agree with such artificial reasoning, and I think that the real damage in this case is to the wife herself. Notwithstanding that it is the husband's duty to support his wife, he is only bound to provide her with necessaries suitable to his station in life; and she might, by visiting friends in a higher position than himself, enjoy luxuries which he either could not or might not choose to afford her."

§ 268. **Same: Liability for repetition.** If the person to whom the defendant makes a defamatory statement

(21) 5 B. & S. 384.

should repeat this statement, is the defendant liable for such repetition? He clearly is so liable if he authorizes it; also even without authorizing it, if he intended that it be repeated; for example if he knowingly told it to a notorious talebearer and tattler. Where the repetition was neither authorized nor intended, but it was a probable result of the utterance of the slander by the defendant, it would seem that the defendant ought to be liable, but upon this point there is a conflict of authority. The point becomes important chiefly where no damage resulted directly from the defendant's utterance, but damage did result from the repetition. In Ward v. Weeks (22) the defendant said to one Bryce that the plaintiff was a rogue and a swindler. Bryce repeated it to one Bryer who thereupon withdrew his trade from the plaintiff; it was held that the defendant was not liable. In Evans v. Harris (23), however, where the defendant made a slanderous statement in the hearing of several customers of the plaintiff, the plaintiff was allowed to recover for a general decrease in his profits, though such decrease might have been due to a withdrawal of custom by persons other than the defendant's immediate audience.

§ 269. **Recovery for mental pain where there is special damage.** Where the plaintiff has been able to prove special damage, it would seem, upon principle, that he ought then to be able to recover for mental pain or other general damage that he has suffered just as he may in

(22) 7 Bing. 211.

(23) 1 H. & N. 251.

case of libel, and in case of slander which is actionable per se; but upon this point there is a conflict of authority. In Dixon v. Smith (24) the plaintiff, a physician, proved the loss of a patient due to the defendant's slander; the court held that he was entitled to compensation not only for that, but also for whatever general damage he may have sustained, apparently referring to mental suffering.

§ 270. **Whether action will lie for damage caused by non-defamatory statements.** In Miller v. David (25) the defendant said of the plaintiff, a stone mason, "he was the ring leader of the nine hour system," whereby the plaintiff suffered damage in his occupation, losing his employment and being compelled to accept less remunerative work at a less convenient place. The court said: "The words used were not connected with the trade or profession of the plaintiff either by averment or by implication; so that the declaration cannot be supported on this ground. There is no averment here that the consequence which followed was intended by the defendant as the result of his words; and therefore it is not necessary to consider the question which was suggested on the argument, whether words not in themselves actionable or defamatory, spoken under circumstances and to persons likely to create damage to the subject of the words, are, when the damage follows, ground of action."

The court suggests that an action ought to lie if the defendant intended to inflict the damage: this is sound;

(24) 5 H. & N. 450.

(25) L. R. 19 C. P. 1187.

it would seem that an action ought also to lie where the damage caused to the plaintiff was the probable result of the statement and the defendant knew the statement to be untrue. Such an action, however, is not covered by the law of defamation; it partakes partly of the character of both defamation and deceit. It is like deceit in that it is necessary that the defendant should not honestly believe the statement; it is like defamation in that the damage which results is caused to the plaintiff through the medium of third persons. An illustration which has been suggested is as follows: Suppose that C wants employment from D, a miserly farmer, who wishes to have none other than miserly people around him; N falsely represents to D that C is a generous, whole-hearted fellow, so that C does not get the place. Such a statement could not, of course, be defamatory, but if it were made with knowledge of its falsity and especially if with knowledge of D's character, it would seem clear that C ought to have a remedy. The law on this point cannot be said to be settled. See § 345, below.

Section 5. Justification.

A. Truth of publication.

§ 271. General rule. In a civil action for slander or libel it is always a complete defence that the defamatory charge is true. It is immaterial whether or not the defendant believed it was true at the time he made it or what his motive was in making it.

§ 272. Criticism of the general rule. In the criminal law, truth is not always a defence to a prosecution for li-

bel, and it has been urged that the law of torts should require not only truth but belief in the truth to be a defence. The operation of the general rule is quite harsh in cases where the plaintiff has reformed and has for several years led a law-abiding and useful life. It is perhaps due to this attitude toward the general rule that the plea of truth is construed with great strictness. Thus in Leyman v. Latimer (26) the statement was, "the plaintiff is a felon." The plea of truth was held not to be made out because the plaintiff had received a pardon for the felony; since from the moment of the pardon he was no longer a felon.

§ 273. **Burden of proof.** The plaintiff does not need to prove that the charge was false; if the defendant relies upon the defence of truth, he must prove it. This is in harmony with the rule of criminal law which requires the state to prove the guilt of the party charged. In some jurisdictions the defendant is required, if he sets up truth as a defence, in cases where the defamatory statement charged the plaintiff with a crime, to prove beyond a reasonable doubt that the plaintiff committed the crime; this is probably carrying the analogy to the criminal law a little too far; the better view merely requires proof by a preponderance of the evidence, as in other civil cases.

§ 274. **Effect of unsuccessful attempt to prove truth.** If the defendant sets up truth and fails to prove it, the effect of such failure in some states is to increase the damages; in others, and by the better rule, if the plea is made in good faith it does not have this effect.

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(26) 3 Exch. D. 15, 352.

§ 275. **Effect of defendant's belief in truth of publication.** The defendant's belief—though honest and reasonable—is not, in itself, a defence. Where the defendant, however, not only knew the statement was untrue, but was actuated by ill will toward the plaintiff, the jury is allowed in some jurisdictions to give the plaintiff punitive damages in addition to full compensation.

B. Repetition of another's statement.

§ 276. **Early law.** It seems to have been the early law that if the defendant repeated a defamation and at the time of the repetition gave the name of the author, it was a justification, provided the words were given with sufficient exactness to ground an action against the author. This went upon the general theory that a cause of action against one individual was a sufficient remedy for a plaintiff.

§ 277. **Modern law.** The whole doctrine has been repudiated in recent times both as to slander and to libel. The court in McPherson v. Daniels (27) said: "As great an injury may accrue from the wrongful repetition, as from the first publication of slander: the first utterer may have been a person insane or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover

(27) 10 B. & C. 263.

damages in a court of law, but that he has been wronged by another person as well as the defendant; and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant."

C. Leave and license.

§ 278. **General effect of consent.** If the plaintiff consented to the publication of the defamation he can not afterwards be heard to complain of it; this is merely an illustration of a general principle running throughout the whole law. There may, however, be some difficulty in determining in any particular case whether the plaintiff did actually consent; for example, if the plaintiff should ask the defendant to repeat the defamatory statement before a witness merely for the purpose of getting testimony for legal redress later, it would seem that this would not bar the plaintiff.

SECTION 6. ABSOLUTE PRIVILEGE.

§ 279. **Statement of the rule.** Under some circumstances it is excusable to publish matter which is both false and defamatory. The reason for this is shortly, that in the affairs of life it is sometimes necessary for the public welfare that an individual's reputation be damaged without liability. Privilege is therefore a kind of justification. In the following cases the privilege is absolute—that is, the parties are protected even though they act from an improper motive and have no belief in the truth of the statements they make:

A. The chief executive of the United States and of

each state and members of the federal and state legislatures, while acting in their official capacities.

B. Judges, juries, parties, counsel, and witnesses, as to relevant statements in the course of judicial proceedings.

C. Reports of naval and military officers in the course of their official duty.

§ 280. **Extent of protection to judges.** In Scott v. Stansfield (28) the defendant, while acting as judge in the trial of a case in which the plaintiff was a party, said of and to the plaintiff: "You are a harpy, preying upon the vitals of the poor." The court said: "The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any act done or word spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of conse-

(28) L. R. 3 Exch. 220.

quences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to his bona fides, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. . . . It is impossible to overestimate the inconvenience of the result. For these reasons I am most strongly of the opinion that no such action as this can, under any circumstances be maintainable."

While a judge would not be justified in delivering from the bench, on his own motion, an address on some matter of public interest, which was defamatory, yet a wide latitude is allowed; the mere fact that the court has no jurisdiction of the case does not deprive him of his privilege while hearing it, unless it was so obvious that he had no jurisdiction that no reasonable man could think otherwise.

§ 281. **Extent of protection to witnesses.** The rule with reference to witnesses is similar to the rule as to judges: the statement must be relevant to the proceeding, but the requirement is construed liberally in favor of the witness. In Seaman vs. Netherclift (29) the defamatory statement was as follows: "I believe the signature to the will to be a rank forgery, and I shall so believe to the day of my death," meaning that the plaintiff had been guilty of forging the signature of the testator, or of aiding and abetting in the forgery. The statement was made while

(29) 2 C. P. Div. 53.

he was in the witness chair, but not in direct response to a question; the circumstances tended to show that the witness was actuated by improper motives, namely, to injure the plaintiff. It was held that the defendant was not liable for slander, Cockburn, C. J., saying: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, after which to contend to the contrary is hopeless. . . . But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states, altogether out of the character and sphere of the witness, or what he may say outside of the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he leaves the witness box is not privileged. Or if a man when in the witness box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: 'Were you at York on a certain day?' and he were to answer,

'yes, and A. B. picked my pocket there;' it certainly might well be said in such a case that the statement was altogether outside of the character of a witness, and not within the privilege." In the same case Bramwell, L. J., said: "I think the words 'having reference to the inquiry' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury or the exclusion of which by the judge, would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness. Taking that view, I think the proposition is established that the statement of the defendant was made as witness and had reference to the inquiry."

In the United States the rule as to parties, counsel, and witnesses is usually stated more strictly, requiring all statements to be pertinent and material to the issue. In Gilbert v. People (30) the alleged libelous matter was part of a declaration in a justice's court, which was prepared and presented to the justice by the now defendant who was acting on that occasion as counsel for the then plaintiff. The court said: "Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor, or counsel therein, if pertinent and material to the matter in controversy, is privileged, and consequently lays no foundation for a private action or a public prosecution. But this is the extent of the privi-

(30) 1 Denio, 41.

lege; for if a party or his agent will pass beyond the prescribed limits to asperse and vilify another by word or writing, he is without protection, and, as in other cases, must abide the consequences of his own misconduct."

Section 7. Fair Comment or Criticism.

§ 282. **Subjects of fair comment.—Importance of motive.** Anything placed before the public for public consideration—such as a book or play—and the conduct of public men may be commented upon and criticised, provided that such comment and criticism be fair and that it be made without malice. The subject of malice will be discussed in the next section; briefly, the requirement that it be without malice is that the criticism be made in good faith with the motive of setting before the public the defendant's honest opinion. The right of fair comment does not give the defendant a right to make purported statements of facts which are untrue; for example, that a certain assertion is in a book which is not there or that a public man said or did something which he did not say or do; nor is there any right to comment upon such untrue statements of fact. In Davis v. Shepstone (31) the court said: "There is no doubt that the public acts of a public man may lawfully be made the subject of comment or criticism, not only by the press but by all members of the public. But the distinction cannot too clearly be borne in mind between comment or criticism and allegation of facts, such as that disgraceful acts have

(31) 11 App. Cases, 187.

been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert falsely that he has been guilty of particular acts of misconduct."

§ 283. **Reasons for allowing fair comment.** In Carr v. Hood (32) the defendant had ridiculed a book which the plaintiff had written and published. Lord Ellenborough said: "Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander, that would have been libelous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criti-

(32) 1 Campbell, 355. n.

cism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold."

§ 284. Unfair comment not allowed even though made with proper motive. In Campbell v. Spottiswood (33) the defendant in a newspaper charged the plaintiff with using a scheme for raising money for missions as a means of personal gain to himself and in using fraudulent devices to procure contributions. In holding that the defendant was not justified, though the jury found that he honestly believed what he wrote, Cockburn, C. J., said: "In the present case, the charges made against the plaintiff were unquestionably without foundation. It may be that, in addition to the motive of religious zeal, the plaintiff was not wholly insensible to the collateral object of promoting the circulation of his newspaper, but there was no evidence that he had resorted to false devices to induce persons to contribute to his scheme. That being so, the defendant's counsel is obliged to argue that because the writer of this article had a bona fide belief that the statements he made were true, he was privileged. I cannot assent to that doctrine. It was competent to the writer to have attacked the plaintiff's scheme; and per-

(33) 3 Best & Smith, 369.

haps he might have suggested, that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket. But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose is charging him with dishonesty: and that is going further than the law allows. . . . It is not because a public writer fancies that the conduct of public men is open to the suspicion of dishonesty, that he is therefore justified in assailing his character as dishonest.''

§ 285. **Who has the right of fair comment?** In cases of absolute privilege discussed in the previous section and of conditional privilege (with the exception of privileged reports) to be discussed in the next section, certain members of the public are clothed with a greater immunity than the rest. In case of fair comment and privileged reports on the other hand, the right is common to all.

§ 286. **Question of what is fair is for the jury.** The question whether comment is fair, just as the general question whether statements are defamatory or not, is one for the jury. In Merivale v. Carson (34) the court said: ''The criticism is to be 'fair', that is, the expression is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limit which the law calls 'fair', and, although we cannot find in any decided case an exact and rigid definition of the word 'fair', this

(34) L. R. 20 Q. B. D., 275.

is because the judges have always preferred to leave the question what is 'fair' to the jury. The nearest approach, I think, to an exact definition has been given by Lord Tenterden (34a): 'Whatever is fair and can be reasonably said of the works or of themselves as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel.' It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left with the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism."

Section 8. Conditional Privilege.

A. Malice.

§ 287. Statement of the rule.—Meaning of malice. One of the essentials of both fair comment and of conditional privilege is that the defendant act without malice. There is no such requirement in absolute privilege.

The common meaning of the term malice is ill will or spite. In a declaration in defamation the term "malicious" is used to mean merely wrongful and inexcusable; it is, however, a rather formal allegation because the plaintiff is not required to negative all excuses at the trial. The meaning of "malice" in fair comment and conditional privilege, on the other hand, is the absence of the proper motive. This is frequently called in the

(34a) In Macleod v. Wakely, Law Rep. 7 C. P. 606.

cases "malice in fact" or "express malice," to distinguish it from the use of the term in a declaration in defamation which is spoken of as "malice in law" or "implied malice."

Though the presence of the proper motive is no defence except in cases of fair comment and conditional privilege, the damages are likely to be less in any case where the motive was proper than where it was improper.

§ 288. **How malice may be proved.** Unless a question of fair comment or conditional privilege is raised, the plaintiff need not prove malice; all he needs to prove is the publication of the defamation; as it is usually stated, the law implies the malice from the publication. But if a question of fair comment or conditional privilege is raised, he must then prove that the defendant acted from an improper motive. This is usually a matter of inference from the circumstances. Thus in Jackson v. Hopperton (35) the plaintiff had been in the defendant's employ as a sales-woman; having left his employ of her own accord, she returned to get some of her property which she had left at his place of business and also to collect her wages; the defendant then accused her of taking a certain sum of money, but said, "If you had come back, I should have said nothing about it." A few days later, the plaintiff applied to one C for a situation; the plaintiff told the defendant that C would apply to him for a reference; the defendant then said, "I will give you no reference, but if you own that you took the money I will

(35) 12 Weekly Reporter, 913.

give you a reference." When C applied to the defendant and asked him his opinion of the plaintiff, the defendant said that the plaintiff was dishonest and had stolen money from him. The court held that, although the occasion was a privileged one, the jury was justified in finding malice and therefore the defendant was liable. The court said: "I think that the fact of charging her with stealing the money, and not making that charge until she had threatened to leave, and then the fact of his telling her that if she had come back he would have said nothing about it, and that if she owned she took it he would give her a reference, were sufficient facts to justify the jury in inferring that he was not performing the important duty between man and man, of stating what he believed to be the plaintiff's true character when he spoke the words which are the subject of this action."

§ 288a. **Question of malice usually for jury.** Malice is usually a question for the jury; if, however, the circumstances fail to show that malice was probable, the question should not be submitted to them. In Somerville v. Hawkins (36) the court said: "On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. . . . It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a prob-

(36) 10 Common Bench, 583.

ability of malice, and be more consistent with its existence than with its non-existence."

§ 289. **Burden of proof of malice.** The burden of proof of malice is always upon the plaintiff, the presumption being that the defendant acted in good faith, from the proper motive. In Jenoure v. Delmege (37) the defendant wrote a defamatory letter complaining of the plaintiff's acts in an official position; he sent it to the wrong authority. The court held that the defendant could be excused if he did this under an honest mistake, and that the burden of proof of malice was upon the plaintiff, saying: "The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case, bona fides is always to be presumed. . . . It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

§ 290. **Must defendant reasonably believe his statement?** According to some authorities the defendant's belief in the truth of the defamatory statement need only be an honest one; it does not need to be reasonable in order to retain his privilege. The court in Clark v. Molyneux (38) said: "The charge of the court below might lead the jury to believe that although they were of the opinion

(37) L. R. (1891) Appeal Cases, 73.

(38) 47 Law Journal Reports, Common Law, 230.

that the defendant did believe what he stated, he would not be protected unless his belief was a reasonable, as distinguished from a pig-headed, obstinate, and insensible one, but the real question, as I have stated, is, whether the defendant did, in fact, believe his statement, or whether being angry or moved by some other indirect motive, did not know and did not care, whether his statement was true or false."

On the other hand, it was held in Carpenter v. Bailey (39) that reasonable belief was essential, the court saying: "The question is, whether the mere fact that the defendant had been informed and believed that a fact was so, is equivalent to having probable cause to believe it to be so. And we think it could not be assumed that it was so. . . . The question for the jury is, not whether the defendant believed it, but had he probable cause to believe it?"

B. Privileged reports.

§ 291. **Statement of the rule.** The rule as to privileged reports is very similar to the rule in regard to fair comment; that is, it is conditioned upon the report being fair and being made with the proper motive of giving the public accurate knowledge. The privilege is open to all.

The general rule is that a report should be a substantially accurate account of the proceedings as a whole; details may be either omitted or summarized. In Milissich v. Lloyd's (40) the court said: "The question is one for

(39) 53 N. H. 590.

(40) 13 Cox, Criminal Cases, 575.

the jury and may be stated as follows: Was the report a fair one: that is, would it give a fair notion to people who were not there of what took place?"

§ 292. **What may be reported.—Reasons for the rule.** Proceedings in courts of law, proceedings in public legislative bodies, and proceedings in public meetings are all subjects of privileged reports.

The reasons for excusing defamation in reports of court proceedings were thus stated by Lord Campbell in Davison v. Duncan (41): "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity."

In Wason v. Walter (42) Lord Cockburn said with reference to reports of proceedings in Parliament: "It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done the welfare of the community depends. . . . It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of

(41) 7 E. & B. 231.

(42) L. R. 4 Q. B. 73.

Parliament should in general be made public, yet that debates in which the character of individuals is brought in question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing Parliamentary reports would be placed if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state."

§ 293. **Report of ex parte judicial proceedings.—Effect of court not having jurisdiction.** In Usill v. Hales (43) three persons, surveyors, applied to a police magistrate to issue a summons against their employer for their wages. The magistrate finally decided that he had no jurisdiction to issue the order, and the application was dismissed, the employer not having been brought before the court at all. The defendant published in a newspaper a report of what passed before the magistrate. The court held that it was a privileged report, saying: "The case of Lewis v. Levy (44) decided that the rule that the publication of a fair and correct report of proceedings taking place in a court of justice is privileged, extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge terminating in the discharge by the magistrate of the party charged. I am of the opinion that this is a case in which

(43) 3 C. P. D. 319.
(44) E. B. & E. 537.

there was a judicial proceeding terminating, not in the discharge of the party accused, because there was no such person before the magistrate, but terminating in a refusal to proceed with the charge and to set the criminal process in motion. I am unable to distinguish the principle of Lewis v. Levy from that involved in the present case."

It would seem that if, on the face of it, the court clearly had no jurisdiction, so that the judge would not be privileged, a report of the proceedings would not be privileged either.

§ 294. **Report of defamatory charges against third person.** A report may contain defamatory charges against third persons even if irrelevant. In Ryalls v. Leader (45) the defendant published in a newspaper a report of a debtor's examination before a registrar in bankruptcy. In upholding a verdict for the defendant, the court said: "I think that this court was a public court. And even if it were not so, if the officer chooses to make it public, it would be public for this purpose. Then as to the point made, that nothing ought to be published affecting a third party, even when relevant to the inquiry, I think there is no such restriction. Those who are present here hear all the evidence, relevant or irrelevant, and those who are absent, may, as far as I can see, have all that is said reported to them."

§ 295. **Report of secret proceedings.** Whether a report of secret proceedings, legislative or judicial, is privileged, seems doubtful. A defendant would probably be liable to punishment for contempt of court in reporting

(45) L. R. 1 Exch. 296.

secret court proceedings, and in England he would probably be liable in a private action to any one defamed in the report. But the point can hardly be said to be settled.

§ 296. **Report of judicial proceedings sent to a newspaper by an attorney.** In Stevens v. Sampson (46) the report of the judicial proceedings was sent to a newspaper by an attorney in the cause. The attorney being sued for libel, it was found by the jury that the report was fair but that the attorney was actuated by improper motives. It was held that the defendant should be held liable; while he was absolutely privileged in conducting the case in court, his report of it was only conditionally privileged.

§ 297. **What is a public meeting?** In Purcell v. Sowler (47) the defendant published in a newspaper a report of the proceedings at a meeting of the board of guardians for a poor law union, at which ex parte charges were made against the plaintiff, the medical officer of a union workhouse, for neglect in not attending pauper patients. The charges were unfounded in fact but the report was accurate and bona fide. The court held that the defendant was liable because the meeting was not a public meeting within the rule as to privileged reports. The court said: "A board of guardians have a discretion whether or not they will admit the public to their meetings; and whether they choose to exclude or choose to admit, the public have no right to complain. Although they admit the public on an occasion when ex parte charges are made against a

(46) 5 Exch. Div. 53.
(47) 2 C. P. Div. 215.

public officer which may affect his character and injure his private rights, it is most material that there should be no further publication. I do not mean to say that the matter was not of such public interest as that comment would not be privileged if the facts had been ascertained. If the neglect charged against the plaintiff had been proved, then fair comment on his conduct might have been justified."

By act of Parliament, however, the privilege of reporting proceedings of public meetings has been much enlarged, the act thus defining public meeting: "For the purpose of this section public meetings shall mean any meetings bona fide and lawfully held for a lawful purpose, and for the furtherance of discussion of any matter of public concern, whether the admission thereto be general or restricted."

The law in the United States has probably gone almost as far as the act of Parliament went in England. In Barrows v. Bell (48) the court said: "So many municipal, parochial, and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business, or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings and a just and proper publication of them, as far as it can be done

(48) 7 Gray, 301.

consistently with private rights. This view of the law of libel is recognized and to some extent sanctioned by several cases in this state."

§ 298. **Reporting proceedings by installments.** Proceedings of public bodies may be reported as the proceedings progress, but there is probably no right to comment upon them till the whole is finished. There is no privilege in reporting a part of a proceeding after it has been entirely closed.

§ 299. **Privilege of newspapers in reporting occurrences.** In the absence of statutes, the publishers of a newspaper have no greater privileges than other persons. In Barnes v. Campbell (49) the defendants, conductors and publishers of a newspaper, were sued for libel in accusing the plaintiff of crime. The court said: "The defendants laid stress upon their business of publishing a newspaper. But professional publishers of news are not exempt, as a privileged class, from the consequences of damage done by their false news. They have the same right to give information that others have, and no more. However high the defendants' vocation, and however interesting and valuable the truth which they undertake to give their readers, their ordinary and habitual calling is no excuse for assailing the plaintiff's character with this false charge of crime. They must show specific facts constituting a lawful occasion in this particular instance, as if this false charge had been the only thing they ever published. They allege nothing of

(49) 59 N. H. 128.

that kind. They do not state that the community had any interest which would have been protected or promoted by the publication complained of if it had been true, or had a right to be or ought to be informed of the subject matter of it in order that they might act upon correct information of it, or that the information given would have been practically useful to anybody if it had been true. This is the substance of a lawful occasion. The defendants' statement contains no specification on this point."

C. Communication in the common interest of a maker and receiver, or in the interest of the maker alone.

§ 300. **Communication in the interest of the maker.** In Blackham v. Pugh (50) the plaintiff had sold his stock in trade at auction and the proceeds were in the hands of the auctioneers. The defendant, who had sold goods to the plaintiff on credit, procured his attorneys to send a notice to the auctioneers not to part with the money because the plaintiff had committed an act of bankruptcy. The plaintiff now sues the defendant for libel. The court said: "This case appears to me to fall within the range of that principle by which a communication, made by a person immediately concerned in interest in the subject matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is held to be excused from responsibility in an action for a libel."

§ 301. **Communication in mutual interest of maker and receiver.** In Lawless v. The Anglo-Egyptian Cotton Com-

(50) 2 C. B. Reports, 611.

pany (51) the defendant corporation published of the plaintiff, their manager, in a report of the affairs of the company, these words: "The share-holders will observe that there is a charge of £1306 for deficiency of stock, which the manager is responsible for; his accounts as such manager in the company have been badly kept, and have been rendered to us very irregularly." The court held that the defendants were properly held not liable, saying: "The conduct of the directors negatives malice on their part and it is clear that they acted bona fide. I think we should be going against what I may call progress if we were to hold that the delivery of the manuscript of the report to the printer for the purpose of having it printed, is a publication which prevents the communication from being privileged. I am quite prepared to hold that a company, having a great number of share-holders all interested in knowing how their officers conduct themselves, is justified in making a communication in a printed report, relating to the conduct of their officers, to all the share-holders that are present or absent, if the communication be made without malice and bona fide."

§ 302. **Charges made upon suspicion of a crime.** In Padmore v. Lawrence (52) the defendant suspected the plaintiff of having stolen a brooch from the defendant's wife; the defendant stated his suspicions to the plaintiff in the presence of a third person and with the plaintiff's concurrence the plaintiff was searched by two women who were called in for that purpose. The brooch was not

(51) L. R. 4 Q. B. 262.

(52) 11 Adolphus v. Ellis, 380.

found, and it was later discovered that the defendant's wife had left it at another place. The court said: "For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if bona fide made in the prosecution of an inquiry into a suspected crime. The jury were to say whether the defendant believed that the brooch was stolen by the plaintiff, and for that reason charged her with having stolen it, and whether his language was stronger than necessary, or whether the charge was made before more persons than was necessary."

§ 303. **Legal duty to make communication not necessary.** In Harrison v. Bush (53) the defendant with other inhabitants of his borough, signed and transmitted to the secretary of state a memorial, complaining of the conduct of the plaintiff as a magistrate during a recent election. In holding that the occasion was a privileged one and therefore that the defendant, acting in good faith, was not liable, the court said: "A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable. . . . 'Duty' cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation. In this land of law and liberty all who are aggrieved may seek redress; and the

(53) 5 E. & B. 344.

alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and duty to inquire into it, and to take steps which may prevent the repetition of it."

D. Communications made in the interest of the recipient.

§ 304. **Illustrations of the rule.** Common illustrations of privileged communications made in the interest of the recipient alone are: (1) statements made with regard to a servant to one who is about to give employment; (2) statements made by commercial agencies in regard to the credit of a business man to one about to extend such credit; (3) statements made in the line of fiduciary duties, by an agent to his principal or by an employee to his employer; (4) statements made between near relatives as to the character of a suitor of the recipient of the statement.

§ 305. **Communications regarding servants.** In Child v. Affleck (54) the plaintiff had been in the service of the defendant. She later left the service and hired to one S, who wrote to the defendant in regard to the plaintiff; the defendant replied that the plaintiff frequently conducted herself disgracefully while in her service, and that she had been credibly informed that the plaintiff after leaving the defendant's service had become a prostitute. It was held that the defendant's statement was a privileged one, unless the plaintiff could prove an improper motive.

§ 306. **Communication may be voluntary.** It was at one time thought that the privilege in this class of cases

(54) 9 Barnwall v. Cresswell, 403.

extended only to communications made in answer to inquiries. That is no longer the law, though it is, of course, often easier to prove malice where the defendant volunteered the information. In Coxhead v. Richards (55) one John Cass, the first mate of a ship, had written a letter to the defendant, stating that the plaintiff, who was the captain of the ship and then in command of her, had been in a state of constant drunkenness during part of the voyage, whereby the ship and crew had been exposed to continual danger. The defendant, upon receiving the letter, showed it to the owner of the ship, who thereupon dismissed the plaintiff from his employment. The jury found that the charges made in the letter were untrue. The court was evenly divided in opinion, but the law is now in accord with the opinion of Tindal, C. J., who held that the case was one of privilege, saying: "I do not find the rule of law is so narrowed and restricted by any authority that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief that it is true, will not be excused, though he has no personal interest in the subject matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by which society is kept up. In Pattison v. Jones (56) the defendant, who had discharged the plaintiff from his service, wrote a letter to the person who was about to engage

(55) 2 Common Bench, 569.

(56) 8 B. & C. 578.

him, unsolicited; he was therefore a volunteer in the matter and might be considered as a stranger, having no interest in the business; but, neither at the trial, nor on motion before the court was it suggested that the letter was, on that account, an unprivileged communication; but it was left to the jury to say whether the communication was honest or malicious."

§ 307. **Statements regarding suitor by one not a member of the family.** While among near relatives statements with reference to the character of a suitor are privileged, it seems probable that the privilege does not extend to one who is not a member of the family. In "The Count Joannes" v. Bennett (57) the defendant, who had been pastor to the recipient of the letters in question and to her parents, wrote the letters at the instance of the parents, endeavoring to dissuade her from marrying the plaintiff. The marriage later actually took place, and the plaintiff now sues for libelous statements contained in the letters. The defendant was held liable, the court, after pointing out that the statement was not made to protect any interest of the defendant, saying: "It is equally clear that the defendant did not write and publish the alleged libelous communications in the exercise of any legal or moral duty. He stood in no such relation toward the parties as to confer on him a right or impose on him an obligation to write a letter containing calumnious statements concerning the plaintiff's character. Whatever may be the rule which would have been applicable under similar circumstances while he retained

(57) 5 Allen, 169.

his relation of religious teacher and pastor towards the person to whom this letter in question was addressed and toward her parents, he certainly had no duty resting upon him after that relation had terminated. He then stood in no other attitude towards the parties than as a friend."

E. Excess of privilege.

§ 308. **Statement of the rule.** The fact that one is privileged to make a statement to another person or to a class of persons does not give him the privilege of publishing it to the whole world. On the other hand, the privilege is not necessarily destroyed because the defamatory statement was communicated to some one other than the one who was entitled to hear it. The test is whether the privilege was reasonably used; if it was not, the defendant is liable for such excess of privilege.

In Toogood v. Spyring (58) the defendant made defamatory statements to a person to whom it was a privileged communication; a third party was present and heard it. In holding that the presence of the third party did not necessarily destroy the privilege, the court said: "I am not aware that it was ever deemed essential to the protection of such communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry, the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business

(58) 1 C. M. & R. 181.

of life could not be well carried on if such a restraint were imposed upon this and similar communications, and if, on every occasion on which they were made, they were not protected unless strictly private. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unprivileged."

§ 309. **Use of a newspaper to make privileged communications to electors.** Communications made to electors in regard to the character of a candidate are conditionally privileged. May such communication be made in a newspaper, which, of course, reaches others than electors? It was held in Duncombe v. Daniel (59) that it was not allowable, the court saying: "However large may be the privileges of electors, it would be extravagant to suppose that they can justify the publication to all the world of facts injurious to the character of any person who happens to stand in the situation of a candidate."

On the other hand, in Marks v. Baker (60) where the plaintiff was city treasurer of Mankato, and candidate for re-election, and the defendants, residents and tax payers of the city, published in their weekly newspaper, the Mankato Free Press, an article charging the plain-

(59) Willmore, Wollaston & Hodges, 101.

(60) 28 Minn. 162.

tiff with not accounting satisfactorily for city funds, there was held to be no excess of privilege, the court saying: "The subject matter of the communication in the case at bar was one of public interest in the city of Mankato, where the publication was made, and one in which the defendants had an interest as residents and tax-payers of the city. It was therefore a privileged communication, if made in good faith."

§ 310. **Use of newspapers to notify business customers.** In Hatch v. Lane (61) the defendant had published the following notice in the Taunton Daily Gazette, concerning the plaintiff: "A young man named George Hatch having left my employ and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business." At the trial the lower court charged the jury that "the publication was a privileged communication if made in good faith in a local newspaper published in Taunton and the jury should find that it was a necessary or reasonable mode of giving notice." The upper court held that this charge was correct, saying: "If the circulation of the newspaper was more extensive than the routes of the defendant's business; or if the communication thereby came to the notice of persons not customers of the defendant, that fact would not, of itself, defeat the defence of privilege; nor necessarily prove malice. It would be evidence upon the question of express malice to be considered by the jury. That question was submitted to the jury under proper instructions; and the jury by their verdict, have

(61) 105 Mass. 394.

found that it was a reasonable mode of giving the notice; thus negativing express malice."

It was material that the paper was a local one; if it had been a large city daily, it would have been more difficult to prove that the use of the privilege was a reasonable one. It was also material that it was the only reasonable method of reaching the customers of the defendant, who was a baker. Thus, reports sent by a commercial agency to its subscribers generally, including those who have no interest in the reports, are not privileged since it would be comparatively easy to send the reports only to those who are interested (62).

§ 311. **Use of the telegraph.** Whether the telegraph may be used in making privileged communications depends largely upon the degree of emergency. It is probably reasonable to use it as a means of intercepting suspected criminals, where waiting to send a letter would allow them to escape.

In Williamson v. Freer (63) the plaintiff was employed in the shop of the defendant, a shoemaker at Leicester; the defendant having accused the plaintiff of robbing him of money sent two post-office telegrams to her father, who resided in London, to inform him of his suspicions. The telegrams read as follows: "Come at once to Leicester, if you wish to save your child from appearing before a magistrate." "Your child will be given in charge of the police unless you reply and come today. She has taken money out of the till." The jury

(62) Erber v. Dun, 12 Fed. 526.

(63) L. R. 9, C. P. 393.

found that the statements were libelous and that it was not reasonable to send them by telegraph. The court held that the defendant was not entitled to privilege, saying: "Sending the messages by telegraph when they might have been sent by letter was evidence of malice. I desire, however, to make a still stronger statement. I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office unreasonably, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post card."

§ 312. **Is publication to a typewriter an excess of privilege?** Whether publication to a typewriter is an excess of privilege seems to be unsettled. In the case of business men with large correspondence it is such a hardship if they may not safely dictate their letters to a typewriter, that it would seem that the law would ultimately allow it where the circumstances showed it to be reasonable. The question is usually raised where the letter is directed and sent to the person defamed; this, strictly speaking, is not a case of privilege, but of no publication whatever; but it would seem that the same principles apply as in case a letter defamatory of A is dictated by the writer and sent to B, to whom it is a privileged communication.

In Pullman v. Hill (64) the court held that such dictation to a stenographer was not privileged, saying: "Can the communication of a libel by the defendant in the present case to the typewriter be brought within the rule

(64) [1891] 1 Q. B. 524.

of privilege as against the plaintiffs—the persons libeled? What interest had the typewriter in hearing or seeing the communication? Clearly she had none. . . . I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libelous matter on their behalf they will be liable for his acts. He ought to write such a letter himself and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody." But it has been held that a lawyer may lawfully use a stenographer in writing defamatory letters, on account of the nature of his business (65).

§ 313. **Effect of sending communications to the wrong party by mistake.** In Tompson v. Dashwood (66) the defendant wrote a defamatory letter concerning the plaintiff to a person to whom it would be a privileged communication. By mistake, he placed the letter in the wrong envelope and thus sent it to the plaintiff's brother, to whom the communication was not privileged. This was held not to defeat the privilege, Mathew, J., saying: "The defendant ought not to be held liable because there was no evidence that the defendant had any malicious feeling in writing the letter and sending it to the plaintiff's brother. Nothing more than negligence was shown; the letter was written honestly to the chairman and a

(65) Boxius v. Freres [1894] 1 Q. B. 842.
(66) 11 Q. B. 43.

mistake was made through the defendant's negligence. It is said that for the consequence of that negligence he is responsible. If that view be correct, on the same principle this action would lie if all that the defendant did was to leave the letter about so that another could read it. I may add that the evidence of negligence here was extremely slight, because any one looking at the first line would see that it had been put by mistake into the wrong envelope."

The case has been criticised and the point can hardly be said to be settled. Whether a defamatory statement which is true of A but published by mistake concerning B, will support an action by B seems likewise unsettled.

CHAPTER IX.

MALICIOUS PROSECUTION.

SECTION 1. MALICIOUS PROSECUTION OF A CRIMINAL PROCEEDING.

§ 314. **Rights protected and essentials of the action.** A malicious prosecution may injure a person in three ways: by damaging his reputation; by infringing upon his right of personal liberty, if he has suffered imprisonment; and by causing him expense in defending himself. Hence the rights protected by the law of malicious prosecution are the rights of reputation, of personal security, and of property.

In order to succeed in an action for the malicious prosecution of a criminal charge, the plaintiff must show, generally, the following requisites: (a) that the plaintiff was prosecuted on a criminal charge; (b) the previous termination of the prosecution; (c) want of probable cause; (d) malice; (e) upon which there is a conflict of authority, special damage, where the charge upon which the prosecution was made was such that if made orally outside of legal proceedings, an action of slander would not lie without proof of special damage.

A. Prosecution on a criminal charge.

§ 315. **Giving information to a magistrate.** If the defendant merely gives information to a magistrate without

making any charge, this is not considered as a prosecution. The test seems to be whether the magistrate acts entirely upon his own discretion or not. Even if he does, however, the defendant may still be liable if he should mislead the magistrate by giving dishonest evidence.

§ 316. **Distinction between malicious prosecution and false imprisonment.** If a charge is made to a ministerial officer, such as a sheriff or a constable, who makes an arrest without getting a proper warrant, the liability in such a case, if any, is for false imprisonment. If the charge is made, however, to a police magistrate, or other judicial officer, so that the forms of law are properly observed, the liability, if any, is for malicious prosecution. The gist of an action for malicious prosecution, then, is setting a magistrate in motion. The mere preferring a charge not followed by action of the magistrate would not be enough.

§ 317. **What is a criminal charge?** The term criminal charge in this connection, probably covers all charges which subject an offender to loss of liberty or which involve scandal to his reputation. The mere fact that the machinery of the criminal law is used is not enough; thus, a conviction on an indictment for the non-repair of a highway would probably not be considered within the meaning of the term.

B. Previous termination of the prosecution.

§ 318. **General rule.** The general rule is that no action will lie for bringing a prosecution until the latter is ended in favor of the accused. The reason for this is that other-

wise there might be a conflict between the civil and criminal courts. It would allow a sort of informal appeal from the court in which the criminal charge was prosecuted. The rule seems to be the same even though the conviction was in an inferior court from which there was no appeal. In Basebe v. Matthews (1), where the plaintiff had been convicted before a justice of the peace for a criminal assault, the court said: "In such an action, it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favor of the plaintiff, if from its nature it is capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause. The only ground upon which counsel has attempted to distinguish this case from the current of authority is that here the plaintiff has no opportunity of appealing against the conviction. If we yielded to his arguments, we should be constituting ourselves a court of appeal in a matter in which the legislature has thought fit to declare that there shall be no appeal."

§ 319. **Exception to rule.** In some cases it is impossible from the circumstances for the criminal proceeding to terminate in favor of the accused. Thus, if his house is unreasonably searched under a search warrant, the pro-

(1) L. R. 2 C. P. 684.

ceeding goes no farther and can hardly be said to be decided in his favor; all that the plaintiff need to prove to satisfy the second requisite is that nothing was found in the search to incriminate him. Another illustration is an ex parte proceeding to have one bound over to keep the peace; it cannot possibly end favorably to the accused.

A voluntary abandonment of the criminal prosecution seems to be a sufficient termination, according to the better view. In Brown v. Randall (2) the defendants, after causing a warrant to be issued against the plaintiff upon which the plaintiff was arrested, sent word to the magistrate that they would prosecute the plaintiff no further. The court said: "On the whole we think it wise and safe, when a prosecution has been abandoned, as this was, without any arrangement with the accused, and without any request from him that it should be so abandoned, to leave the question of probable cause to the jury, this being a sufficient termination of the prosecution to comply with the legal requirement." On the other hand, an abandonment of the criminal prosecution by way of compromise with the accused is not sufficient.

C. Want of probable cause.

§ 320. **Definition of probable cause.** Probable cause has been judicially defined as follows: "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." The use of the word

(2) 36 Conn. 56.

"cautious" has been criticised; it would be more accurate to use the term "reasonable." The use of the phrase "want of reasonable and probable cause" is quite common.

§ 321. **Want of probable cause not to be inferred from malice.** Though want of probable cause is a negative proposition, the plaintiff must prove it; it is not sufficient to prove malice, because one might very likely have an improper motive for bringing supposed criminals to justice and yet have probable cause for having the prosecution made. In Foshay v. Ferguson (3) the court said: "The defendant, at the time he went before the grand jury, had strong grounds for believing that the plaintiff has stolen the cattle; and, so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different opinion. . . . Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains; and so long as it exists it is a complete defence."

§ 321a. **What amounts to want of probable cause.** Where there has been a conviction in a lower court which is later reversed, this is usually held to negative want of probable cause unless the conviction in the court below was procured by fraud on the part of the now defendant. This rule has been criticised but it is, perhaps, justified because of the general attitude of the courts against the

(3) 2 Denio, 617.

action. In Cloon v. Gerry (4) the court said: "This kind of suit, by which the complainant in a criminal prosecution is made liable to an action for damages at the suit of the person complained of, is not to be favored; it has a tendency to deter men who know of breaches of the law from prosecuting offenders, thereby endangering the order and peace of the community. Absence of probable cause is essential; from want of probable cause malice may be inferred; but from malice, want of probable cause cannot be inferred."

§ 322. **Acting upon advice of counsel.—Belief must be honest as well as reasonable.** If the defendant in bringing the prosecution acts upon the advice of a lawyer, this is generally held to negative the want of probable cause, provided he acts honestly as well as reasonably: if he did not believe the lawyer he would not be protected. In Ravenga v. Mackintosh (5) the court said: "If a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description. The jury in this case have found, and there was abundant evidence to justify them in drawing the conclusion, that the defendant did not act bona fide, and that he did not believe that he had any cause of action whatever. Since the jury have found thus, the court is bound to say that there is a want of probable cause."

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(4) 13 Gray, 201.

(5) 2 B. & C. 693.

In Haddrick v. Heslop (6) the action was for maliciously and without reasonable and probable cause indicting the plaintiff for perjury. It appeared that the now defendant received the account of Haddrick's evidence from another party and then stated that he would indict Haddrick for perjury; his informant thereupon expressed an opinion that there was no ground for such indictment; at which the defendant said that even if there were not sufficient grounds for the indictment, it would tie Haddrick's mouth for a time. The court below held that the defendant did not have reasonable and probable cause. The upper court sustained this, saying: "It would be quite outrageous, if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause. . . . I think that belief is essential to the existence of reasonable and probable cause; I do not mean abstract belief, but a belief upon which the party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense."

§ 323. **Question of want of probable cause is for the court.** The question of want of probable cause, though one of fact, is to be decided by the court and not by the jury. The reason for this is probably that the courts, in order not to discourage prosecution, have tried to make the bringing of the action difficult; they have therefore sought to keep the action very much within their control and have been reluctant to allow a jury to pass upon this question.

(6) 12 Queen's Bench, 267.

D. Malice.

§ 324. **Meaning of malice.** Malice here, as in fair comment and conditional privilege in the law of defamation, means the absence of the proper motive. In prosecuting supposed criminals, the proper motive is the duty to the public and the furtherance of justice. If there is both a proper and an improper motive, the proper motive must be predominant, probably, in order to negative malice.

§ 325. **Question of malice is for the jury.** The question of malice is for the jury, as in fair comment and conditional privilege; it is not implied by law. In Mitchell v. Jenkins (7) the plaintiff was indebted to the defendant in the sum of £45; the defendant was indebted to the plaintiff in the sum of £16; and the defendant wrongfully arrested the plaintiff for the whole debt and not merely for the balance. The lower court ruled that the law implied malice; the case was reversed because the question of malice should have been submitted to the jury.

§ 326. **Malice may be inferred as a fact from want of probable cause.** If want of probable cause is proved, it is a fair inference of fact, though not a necessary one, that the defendant acted from improper motives. Hence the plaintiff is entitled to have the case go to the jury without any other evidence of malice. In Vanderbilt v. Mathis (8) the court said: "Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events, merely because they may find the absence of probable cause. Evi-

(7) 5 B. & A. 588.

(8) 5 Duer, 304.

dence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by publication, are properly admitted to prove malice. . . . The want of probable cause may be shown, and yet, upon the whole evidence, in any given case, it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such, that a jury can not properly doubt the honesty and purity of the motive which induced the former prosecution, and they fully believe that it was instituted for good motives and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict."

E. Damage.

§ 327. **Whether special damage is necessary.** Whether special damage is necessary in those cases where the charge upon which the plaintiff was prosecuted was one which, if made orally, outside of a judicial proceeding, would require the proof of special damage, seems unsettled. In Byne v. Moore (9) the action was for malicious prosecution in indicting the plaintiff for assault and battery; the bill was preferred and not found. The court held that the plaintiff could not recover, saying: "I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages because he clearly has not proved that he has sustained any: I can understand the ground upon which an

(9) 5 Taunton, 187.

action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it."

The case has been criticised on the ground that a charge of breaking the peace does contain an imputation on the character of the person charged.

SECTION 2. MALICIOUS INSTITUTION OF A CIVIL ACTION.

§ 328. **Distinction between civil and criminal prosecution.** One who has a civil action instituted against him maliciously and without probable cause, ought, logically, to have a remedy just as one has who has been maliciously prosecuted upon a criminal charge. Such seems to be the theory, but unless he is arrested or his property attached, the only damage that he is likely to sustain is the cost of defending the suit. He is supposed to be adequately compensated for this by the judgment in the previous action; in England where the judges are given wide discretion in this regard, the facts are fairly well in accord with the theory; in this country, on the other hand, the costs allowed to a successful defendant rarely compensate him for his expenses. Where he is adequately compensated by his judgment for costs and where his person and property have not been interfered with, the plaintiff would probably have to prove special damage. Even if fraud were charged in the declaration in such a case it would not excuse the proof of special damage.

In Wetmore v. Mellinger (10) the present defendants had brought an action against the plaintiff and his wife,

(10) 64 Iowa, 741.

charging that they two conspired to defraud the defendants by representing to the defendants that they were owners of certain land which the defendants were induced to purchase; that the plaintiff's supposed title was forged and fraudulent which the plaintiff and his wife well knew and that the plaintiff secured $3,000 by fraud. The plaintiff in his petition in this case alleged that the defendants served out a writ of attachment which was levied upon real estate belonging to the plaintiff's wife and that later the suit was dismissed at the defendants' cost. He also alleges that he was not indebted to the defendants, that he was not guilty of the fraud charged, and that the action was commenced and prosecuted by the defendants maliciously and without probable cause. There was no evidence tending to show that the writ was levied upon any of the plaintiff's property. In holding that the plaintiff's petition was not sufficient the court said: "We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of the defendant, and no special injury sustained which would not necessarily result in all suits prosecuted to recover for like causes of action. If the bringing of the action operates to disturb the peace, to impose care and expense, or even to cast discredit and suspicion upon the defendant, the same results follow all actions of like character, whether they be meritorious or prosecuted maliciously and without probable cause. They are incidents of litigation. But if

an action is so prosecuted as to entail unusual hardship upon the defendant, and subject him to special loss of property or of reputation, he ought to be compensated. So, if his property be seized, or if he be subjected to arrest by an action maliciously prosecuted, the law secures to him a remedy. In the case at bar the pleadings and evidence show no such special damage. No action could be prosecuted to recover money fraudulently obtained, in which the defendant would not suffer the very things for which the plaintiff in this case seeks compensation and damages."

Section 3. Malicious Abuse of Process.

§ 329. **Statement of the rule.** A legal process, though instituted with reasonable and probable cause, may be maliciously employed for some collateral object of extortion or oppression; in such a case the party thus aggrieved may have a remedy though the previous proceeding may not have terminated in his favor.

In Grainger v. Hill (11) the plaintiff, who was master and owner of a vessel, had been arrested on civil process by the defendant, a mortgagee of the vessel, and, under the duress of the imprisonment, was compelled to give up the possession of the ship's register without which he could not go to sea; whereby he lost the profits on four voyages. The court said: "This is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support

(11) 4 Bingham, New Cases, 212.

which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. . . . If the course pursued by the defendant is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not or whether or not it is founded on reasonable and probable cause."

CHAPTER X.

INTERFERENCE WITH DOMESTIC AND BUSINESS RELATIONS

§ 330. **Introductory.** Not only does the law shield men from attacks upon their persons, property, or reputation, and protect them from deception and malicious prosecution, but it also guards from improper interference their more important social relations, particularly those of a family or business nature. The domestic relations have been thus protected from the earliest times, and, as the members of civilized communities become increasingly dependent for a livelihood upon business relations voluntarily entered into and sustained with one another, the importance of protecting these relations and preserving the opportunities to form them correspondingly increases. A free market for goods and labor is the economic ideal of this branch of the law, and any interference with this must show a justification. Such interference may affect relations already formed, or may merely prevent their formation, and the subject is divided into two sections upon this distinction.

Section 1. Inducing or Aiding Breaches of Legal Duty.

A. Duty of servant to master.

§ 331. **Enticing away servant.** In Hart v. Aldridge

(1) the action was brought for enticing away two of the plaintiff's servants who used to work for the plaintiff in the capacity of journeymen shoemakers; the jury found that the workmen were employed for no determinate time but only by the piece, and had, each of them, a pair of shoes unfinished at the time they left the plaintiff's service. The court held that the plaintiff was entitled to recover, Lord Mansfield saying: "The jury have found that these workmen were the plaintiff's journeymen. A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished."

In such a case the motive is not material. The action was originally founded upon an old statute of laborers, which made it a criminal offence for a servant to leave before the end of his term or for any party to receive and keep a servant who had so left; the action became so well settled that it survived the repeal of the statute. The theory of the statute of laborers was that the master's right was a property right and not merely a right of contract.

§ 332. **Seduction of daughter or servant.** An action of trespass has lain from very early times for seducing and debauching a daughter or female servant whereby the plaintiff was damaged by loss of service. As Tindal, C. J., said in Grinnell v. Wells: "The foundation of the action by a father to recover damages against the wrongdoer

(1) Cowper, 54.

for the seduction of his daughter has been uniformly placed from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest" (2).

In modern times courts have gone a long way towards allowing slight proof of service to be sufficient in cases where a parent sues for the seduction of his daughter, so that the loss of service has almost become a fiction. For example, making tea has been held sufficient evidence of service. In case of a suit by a parent, if recovery is allowed, it may include the injury to his feelings; in most cases this is the chief element in the recovery.

B. Marital duties.

§ 333. **Duty of wife to husband.** The old law apparently allowed an action to the husband in all cases where the defendant induced the wife to live apart from him, without regard to the motives involved, as in case of enticing away servants. At the present time the better view is that the plaintiff must show an improper motive or bad faith. In Tasker v. Stanley (3) the court said: "These are actions for procuring and enticing the plaintiff's wife to live separately from him. They are not actions brought for a slander in consequence of which his wife left him, but they are brought for persuasions which may have been based wholly upon the truth. There was

(2) 7 M. & G. 1033.

(3) 153 Mass. 148.

no evidence offered that the defendant spoke any falsehoods, or that their conduct was unlawful for any other reason than its tendency to produce a separation. If the defendant did intend to induce a separation, they had a right to show that their advice was given honestly, with the view to the welfare of both parties. For a married woman to leave her husband without cause is not a great crime. It is legal if with his consent, and if against his will it is only illegal in the sense that, if she keeps away from him for three years, he may get a divorce. A married woman must be supposed to be capable of receiving advice to separate from her husband without losing her reason or responsibility. Good intentions are no excuse for spreading slanders. But in order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives."

§ 334. **Criminal conversation.** The husband may maintain an action against one for illicit intercourse with his wife, whether the result of seduction or not; in such a case, no loss of service need be proved. See the article on Domestic Relations, §§ 73-74, elsewhere in this volume.

§ 335. **Duty of husband to wife.** In those jurisdictions where a married woman's disability to sue in her own name has been removed, it is generally held that she may maintain an action against one who, by improper persuasion, deprives her of her husband's society. A common illustration of this class of cases is a suit brought

against another woman for alienating the husband's affections.

C. Contractual duties

§ 336. **General rule.—Lumley v. Gye.** The modern rule is that if the defendant maliciously procures a third person to break his contract with the plaintiff, the plaintiff is entitled to maintain an action for the damage resulting.

The leading case on the point is Lumley v. Gye (4). In that case one, Miss Wagner, was under a contract with the plaintiff to sing and perform for three months at the plaintiff's theatre; the defendant, the manager of a rival theatre, induced Miss Wagner to break her contract with the plaintiff. It was conceded that Miss Wagner was not a servant of the plaintiff within the rule as to enticing away servants. The court held that the plaintiff's action was maintainable, even though Miss Wagner had not entered upon the performance of the contract.

§ 337. **Meaning of malice in this connection.** The term "malice" used in this connection usually means that the defendant intended to gain a benefit for himself at the expense of the plaintiff. While this is generally allowable in case of ordinary business competition, the effect of Lumley v. Gye is to make it actionable to induce, with such a motive, others to break contract relations with a business rival. In Bowen v. Hall (5), which affirmed the doctrine of Lumley v. Gye, the court said:

(4) 2 Ellis & Blackburn, 216.
(5) 6 Q. B. D. 333.

"Merely to persuade a person to break his contract may not be wrongful in law or fact. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. . . . It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendant."

Suppose the defendant induces the third party to break the contract for the benefit of the third party himself, instead of for defendant's benefit. In both Lumley v. Gye and Bowen v. Hall it was admitted that some kinds of benefit to the contracting third party might justify a defendant in persuading him to break the contract. Persuading a man to break a contract to voyage to a distant and unhealthful country was put as an instance. In a recent English case (6) the question arose on these facts: A large number of coal miners agreed to work for the

(6) Glamorgan Coal Co. v. So. Wales Miners' Federation, (1905) 2 K. B. 545.

members of a mine owners' association under a certain contract, one clause of which forbade its termination save upon notice. Their wages were fixed by a sliding scale dependent upon the price of coal. A miners' federation attended to the interests of the miners. The council of this federation, fearing an overproduction that would reduce the price of coal and so wages, ordered the miners to stop work for four days. The mine owners sued the federation and its council for causing this breach of contract to their damage, and were allowed to recover. The court said that a mere pecuniary benefit to a party from breaking his own contract was no sufficient justification to a third party who induced him to do so.

D. Duty to refrain from torts.

§ 338. **Inducing actionable tort by third person.** In Newman v. Zachary (7) the defendant was the plaintiff's shepherd; two of the plaintiff's sheep having strayed, one was found again, which the defendant affirmed to be the plaintiff's, whereupon the plaintiff paid for the feeding of it and caused it to be shorn and marked with his own mark; afterwards the defendant falsely represented to the bailiff of the manor that the sheep was an estray, whereupon the bailiff wrongfully seized it. The court held that the plaintiff had a remedy against the defendant for thus causing the commission of the tort, although he also had a remedy against the bailiff.

§ 339. **Inducing privileged tort by third person.** In Rice v. Coolidge (8) the facts were that a proceeding for

(7) Aleyn, 3.

(8) 121 Mass. 393.

divorce had been brought by one Mary Coolidge against her husband, Joseph, in which the former alleged that the latter had been guilty of adultery with the plaintiff; that the defendants conspired together and with Mary Coolidge to procure and did procure witnesses to testify falsely in support of the said charge of adultery. The court held that upon these facts the plaintiff was entitled to maintain an action against the defendants though no action lay against the witnesses themselves on account of privilege, saying: "The question is presented, therefore, whether the plaintiff may maintain an action of tort, in the nature of the common law action on the case, against the defendant for suborning witnesses to falsely swear to defamatory statements concerning the plaintiff in a suit in which neither of the parties to this suit was a party. The defendants contend that the witnesses who uttered the defamatory statements are protected from an action, because they were statements made in the course of judicial proceedings, and that therefore a person who procured and suborned them to make a statement, was not liable to an action. The reasons why the testimony of witnesses is privileged are that it is given upon compulsion and not voluntarily, and that, in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony. But these reasons do not apply to a stranger to the suit, who procures and suborns false witnesses, and

the rule should not be extended beyond those cases which are within its reasons."

Section 2. Influencing Third Persons Who Owe No Legal Duty.

A. Slander of title and disparagement of goods.

§ 340. **Slander of title.** In order to maintain an action for slander of title the plaintiff must prove that the defendant made a false statement to a third party with reference to the plaintiff's property, that the defendant knew the statement was false, and that the plaintiff suffered damage in consequence thereof.

§ 341. **Special damage essential.** In Malachy v. Soper (9) the defendant had published in a newspaper that the petition in a bill filed in the court of chancery against the plaintiff and certain other persons as shareholders in a certain mine, for an account and an injunction, had been granted by the vice chancellor, and that persons duly authorized had arrived in the workings. The court held that the action could not be maintained without proof of special damage, saying: "The publication is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must show a special damage to have happened from the publication. . . . It has been urged, that however necessary it may be, according to the ancient

(9) 3 Bingham, New Cases, 371.

authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different ground; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication. . . . We are of opinion that the necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words, or writing, or print; but that it rests on the nature of the action itself, namely, that it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication appears to us to make no other difference than that it is more widely and permanently disseminated and the damages in consequence more likely to be serious than where the slander of title is by words only; but that it makes no difference whatever in the legal ground of action."

§ 342. **Meaning of malice in this connection.** The term malice here means lack of good faith; that is, that the defendant did not believe the statement to be true. In Pitt v. Donovan (10) the plaintiff had bought some land from one Y and was about to sell the same to one Barton; the defendant wrote two letters to Barton, warning him against completing the purchase, on the ground that Y was insane at the time of his conveyance to the plaintiff; Barton therefore declined to purchase the land. The lower court charged the jury in substance that if there

(10) 1 Maule & Selwyn, 639.

was not reasonable and probable cause for believing Y to be insane, there was malice on the part of the defendant. The upper court held that this was incorrect, saying: "The question here is not what judgment a sensible and reasonable man would have formed in this case, but whether the defendant did or did not entertain the opinion he communicated. The short question is, whether the defendant acted bona fide."

B. Fraud.

§ 343. **Deceptive use of another's trade name.** In Stone v. Carlan (11) the plaintiffs, who were engaged in the passenger transfer business, had an agreement with the proprietors of the Irving House by which they were permitted to use the name of such proprietors and the name of their hotel upon the plaintiffs' coaches and the badges of their service. The defendant, who was a rival, also used the name of "Irving" upon his servants and coaches. The plaintiffs did not, as they might have done successfully, sue at law for damages but sued in equity for an injunction; the court granted the injunction, saying: "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby impersonate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. The same principles apply to a case of this sort. The false pretences of the defendant

(11) 13 Law Register, 360.

would, I think, necessarily tend to mislead. The defendants have a perfect right to engage in a spirited competition in conveyance of passengers and their baggage. They may employ better carriages than the plaintiffs. They may carry for less fare. They may be more active, energetic, and attentive. The employment is open to them, but they must not dress themselves in colors, and adopt and bear symbols, which belong to others."

§ 344. **Defaming persons closely associated with plaintiff.** In Riding v. Smith (12) the plaintiff was a grocer and draper and was assisted in conducting his business by his wife Margaret; the defendant published of the wife that she had been guilty of adultery, and as a consequence the plaintiff's business was injured; the defendant knew that his statement was false, and made it for the purpose of injuring the plaintiff. The court held that the plaintiff was entitled to a remedy, saying: "The action is not slander but an action by the plaintiff, a trader, carrying on business, founded on an act done by the defendant which led to loss of trade and customers by the plaintiff. The two questions are, first, whether such an action is maintainable at all; and, secondly, whether it can be maintained without proof of something of the same kind as the special damage that would have to be proved in an action for slander. It is of little consequence whether the wrong is slander or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff. Supposing the statement made not to be slander, but something else calculated to injure

(12) 1 Exch. Div. 91.

the shopkeeper in the way of his trade, as for instance the statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner. . . . In order to show special damage I think it is sufficient to show that from the time of the injury being done the business has fallen off, and that it is unnecessary to prove that any particular persons have ceased to deal with the plaintiff."

§ 345. **Other illustrations.** In Ratcliffe v. Evans (13) the plaintiff had carried on for many years the business of engineer and boiler maker; the defendant, publisher of a weekly newspaper, printed a statement that the plaintiff had ceased to carry on the business, whereby the plaintiff's business was injured. The court held that the plaintiff was entitled to an action, saying: "That an action will lie for a written or oral falsehood, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damages, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occa-

(13) [1892] 2 Queen's Bench, 524.

sion or excuse, analogous to an action for a slander of title. To support it actual damage must be shown, for it is an action which only lies in respect to such damage as has actually occurred."

In Morasse v. Brochu (14) the plaintiff was a physician whose practice had been chiefly among communicants of the Notre Dame Roman Catholic church of Southbridge; his first wife having obtained a divorce from him, he remarried, the ceremony being performed by a justice of the peace. This marriage excommunicated him from the church. The defendant, the clergyman in charge of the parish, publicly warned his parishioners not to employ the plaintiff, stating that the plaintiff was unfit to associate with persons of good moral and religious character and to be received and employed by them; also stating that he would not visit a sick person where the plaintiff was present. The result of this was that the plaintiff's practice was practically ruined. In holding that an action lay, the court said: "It is sometimes said that an action will not lie unless the words used are defamatory. But the better rule is, that such an imputation, whether defamatory of the plaintiff or not, will support an action under the circumstances of this case. It may not be technically an action for slander, if the words are not defamatory; but the name of the action is of no consequence. In Kelly v. Partington (15) Littledale, J., suggested the following illustration: 'Suppose a man had a relation of a penurious disposition and a

(14) 151 Mass. 567.

(15) 5 B. & Ad. 645, 648.

third person, knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?' And Sir John Campbell answers, 'If the words were spoken falsely, with intent to injure, they would be actionable.' In such a case there is an intentional causing of temporal loss for damage to another without justifiable cause, and with the malicious purpose to inflict it, which will sustain an action of tort.''

In Hughes v. McDonough (16) the plaintiff, who was a blacksmith and horseshoer, had shod a horse for one V, one of his customers, in a good and workmanlike manner; the defendant, maliciously intending to injure the plaintiff in his trade, loosed the shoe which had been put on by the plaintiff, so as to make it appear that the plaintiff was an unskilful blacksmith and to cause him to lose the custom of V; the plaintiff did lose V's custom. The court held that the plaintiff was entitled to recover, saying: ''It is admitted that the plaintiff has sustained a loss by the fraudulent misconduct of the defendant; that such loss was not only likely, from the natural order of events, to proceed from such misconduct, but that it was the design of the defendant to produce such a result by his act. Under such circumstances it would be strange, indeed, if the party thus wronged could not obtain indemnification by an appeal to the judicial tribunal.''

(16) 43 N. J. 459.

C. Force or threats of force.

§ 346. **Interference by force.** In Tarleton v. M'Gawley (17) the plaintiffs had sent a vessel to trade with the natives on the coast of Africa. The defendant, maliciously intending to hinder the natives from trading with the plaintiff, fired from his ship into a canoe of natives and killed one of them, whereby they were deterred from trading with the plaintiff. The court held that the plaintiff was entitled to maintain an action, saying: "Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice he might have done so, but he had no right to take the law in his own hands."

§ 347. **Other illustrations.** In Green v. London Omnibus Company (18) where the defendant, an omnibus proprietor, with the purpose of preventing the plaintiff, his rival, from having a fair chance of attracting customers to his omnibuses, habitually placed his own omnibuses so close behind those of his rival that the doors of the latter could not be opened, it was held that the plaintiff was entitled to a remedy.

In Keeble v. Hickeringill (19) in which an action was held to lie for frightening away wild fowl from the plaintiff's land for the purpose of injuring the plaintiff, the

(17) Peake, 205.
(18) 7 C. B. N. S. 29.
(19) 11 East, 574.

court said: "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood an action lies. . . . One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are lured from the old school to come to his new. In such a case no action lies. But suppose the new schoolmaster or some third person should lie in the way with a gun, and frighten the boys from going to school, and their parents would not let them go thither; surely that schoolmaster might have an action for the loss of his scholars."

So it is actionable if, in order to injure the plaintiff, the defendant by force or threats of force prevents persons from being employed by the plaintiff, to the plaintiff's damage. This sort of case usually arises in labor disputes, where strikers place pickets to prevent other workers from taking their places.

D. Persuasion and economic pressure.—Competition.—Motive.—Combination.

§ 348. **In general.** Upon practically all the questions in this subsection there is a difference of opinion, and upon most of them a conflict of authority. The law is not likely to be settled until some economic questions arising out of modern business and industrial conditions are solved. Since the law is thus in a state of transition, it will be necessary to give the divergent views upon the points discussed.

§ 349. **Persuasion without justifiable cause.** In

Walker v. Cronin (20) the plaintiff alleged in his declaration that the defendant, with intent to injure the plaintiff's business and without any justifiable cause, persuaded persons who were about to enter into the plaintiff's employment to abandon it, to the plaintiff's damage. The declaration was held sufficient, the court saying: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be protected against malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is loss without legal wrong, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious act of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands upon a different footing and gives rise to a right of action." The court expressly refused to decide what would be justifiable cause other than competition, but suggested that if it were by way of friendly advice, honestly given, it would probably not be actionable.

§ 350. **Who are competitors?** In so far as competition may be urged as a justification for persuading or by economic pressure coercing third parties not to have dealings with a plaintiff, it is necessary to define competition. Suppose A and X are each selling soap to druggists, and A offers lower prices, or refuses to sell to any druggist

(20) 107 Mass. 555.

who will not buy of A exclusively. X is thus injured in his trade. Or suppose a labor union refuses to work for an employer unless he employs union labor exclusively, and non-union men thus lose employment. The contest between A and X and between the union and non-union men is here competition in the strict sense. Each is offering similar goods or services to a common customer, and each is trying to secure an exclusive market. In so far as competition is a justification, it is here established.

But suppose the members of a labor union leave A's employment in order to compel the payment of higher wages, and, this being ineffective, they refuse to deal with or work for A's customers unless they cease trading with A. A and the union are not competitors, strictly, because they are not offering to a common public or customer the same kind of goods or services. The union is simply trying to coerce an unwilling third party to take sides with it against A. This is what is called a boycott, and it is everywhere illegal (21). The rival parties are not engaged in competition to secure trade or employment from common third parties, but are engaged in a bargaining struggle with each other, and neither may legally secure allies by economic coercion.

§ 351. **Persuasion by individual non-competitors.** In Graham v. St. Charles Street Railroad Company (22) the plaintiff was a proprietor of a grocery store opposite the defendant company's stable and other buildings; the

(21) Barr v. Essex Trades Council, 53 N. J. E. 101; Quinn v. Leathem, (1901) A. C. 495.

(22) 47 La. Ann. 214, 1657.

other defendant, Newman, who was the foreman of the defendant company, and as such had the power of employing and discharging its employees, succeeded in inducing the employees, by persuasion and threats of discharge, not to deal at the plaintiff's store, to the plaintiff's damage; the defendant's motive in doing so was ill will toward the plaintiff and a deliberate desire to injure him. The court held that the plaintiff was entitled to recover against Newman, but not against the company, because it was not responsible for the foreman's conduct. The court said: "A careful consideration of the testimony impresses us, as we must conclude it did the jury, that the defendant did use efforts to divert employees from dealing with the plaintiff, and that his motive was not to enforce the rules or discipline of the company. The right of protection to the citizen in the pursuit of the avocation by which he gains his livelihood is as important as the security of his person and property. No man is privileged to injure another in his business. If the defendant, Newman, by his conduct and language sought to create a feeling or prejudice against the plaintiff, deterring those from buying from him inclined to do so, we think reparation is due the plaintiff."

In the London Guarantee Association v. Horn (23) the plaintiff, Horn, while in the employ of Arnold, Schwinn and Company, as foreman of the frame department of its bicycle factory, was injured while engaged in his work. A., S. and Company carried with the defendant company an indemnity policy, indemnifying the firm against loss

(23) 206 Ill. 493.

from injury to its employees; this policy, by its terms, could be cancelled by the defendant on five days' notice. The plaintiff brought suit against A., S. and Company and recovered a judgment for $3,500. The defendant's representative offered the plaintiff $100 in settlement of his claim and told him that unless he accepted that amount he would have the plaintiff discharged by A., S. and Company, who had re-employed him. The plaintiff refused the offer, and thereupon the defendant gave notice to A., S. and Company that unless they discharged the plaintiff the defendant would cancel the indemnity policy which A., S. and Company had upon the plaintiff. A., S. and Company thereupon discharged the plaintiff. The plaintiff did not have a contract of service with A., S. and Company, but the latter would have been willing to employ him indefinitely. The majority of the court held that the plaintiff was entitled to recover, saying: "Arnold, Schwinn and Company had the undoubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical and malicious, or for no reason at all, and no cause of action in his favor would be thereby created; but it by no means follows that while the relations between A., S. and Company and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ all the year round, that the interference of the defendant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of the defendant, it would not have exercised, is not actionable." The dissenting judges said: "That

the defendant had a legal right to cancel the policy if its motive had not been bad is not denied, and the threat to do it did not become unlawful because of a bad motive. On that subject Mr. Justice Cooley says: 'Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.' . . . It certainly makes no difference whether the motive is to injure the employee who is discharged, or to obtain a benefit to the one causing a discharge."

The decisions in these cases would seem to represent the better view, but there are cases inconsistent with them. In Guethler v. Altman (24) the plaintiff was engaged in the confectionery and school supply business in the city of Huntington, and a large portion of his trade was obtained from the pupils of the city schools. One Crull, a teacher in the schools, succeeded in inducing, by means of persuasion and threats of suspension, many of the pupils from patronizing the plaintiff or visiting his place of business, whereby the plaintiff's business suffered serious damage. The court held that the plaintiff was not entitled to an action, saying: "It was not an unlawful act for Crull to advise or persuade the pupils not to visit the plaintiff's store. The fact that he acted maliciously does not change the rule. An act which is lawful in itself, cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful. We know of no au-

(24) 26 Ind. App. 587.

thority holding that an action will lie for maliciously persuading a party not to enter into a contract."

§ 352. **Persuasion by individual competitors.** Until a few years ago it was considered settled that the right to use persuasion in competition was practically absolute. The general right to damage another by competition had been long recognized. In a case decided in 1410, the plaintiff was a master of a grammar school at Gloucester; the defendant set up a rival school in the same town, so that instead of receiving two shillings a quarter from each child the plaintiff received less than a shilling. The court held that no action lay.

A modern illustration of competition is found in Robison v. Texas Pine Land Association (25). The action was for damages for boycotting the plaintiff and breaking up his saloon business, located three miles from the defendant's store. The defendant corporation paid its employees in cardboard checks, redeemable in merchandise at the defendant's store. The words "not transferable" were printed on the checks, but the employees were accustomed to use them in place of money in small transactions with the plaintiff and others, and the defendant had honored the checks thus transferred. The defendant, in order to drive the plaintiff out of business, stated to its employees that it would discharge anyone who should buy goods or liquors at the plaintiff's store, and that it would not honor any checks which had passed through the plaintiff's hands; it also threatened to discharge any employee who refused to sign a petition for a local option election; by

(25) 40 S. W. (Tex.) 843.

means of these acts on the part of the defendant, the plaintiff's business was damaged. It appeared that the plaintiff and defendant were business competitors except in the sale of liquor. The court held that no action lay, saying: "If the defendant could so control its employees as to prevent their dealing with the plaintiff, or so control their wages as to divert them from the plaintiff's business in favor of its own, we know of no rule making it actionable. Had the defendant no proper interest of its own to subserve in so doing, but had acted wantonly in causing loss to the plaintiff, the rule would be different. The fact that the defendant's purpose by its acts was to break the plaintiff up in business would not give a cause of action, for that is the natural result of successful competition. . . . The defendant could not be required to treat the checks as money in the hands of other persons, which is practically the contention of the plaintiff. They could stop the system altogether without giving a right of action in tort, and it follows that they could place restrictions on the use of checks without incurring any liability."

§ 353. **Is the right to compete by lower prices absolute?** Generally speaking the right to offer goods at lower prices is justifiable competition, even though the effect of it is to ruin the rival's business. Suppose, however, the defendant offers his goods at prices below the price of production so as to drive competition out of the field, is this justifiable? In Passaic Print Works v. Ely

Dry Goods Company (26) the plaintiff was engaged in the manufacture of prints or calicoes which it sold to jobbers, who in turn sold to retailers. The defendant company combining with others to injure the business of the plaintiff, offered for sale by circulars to the retail trade, prints at prices lower than those fixed by the plaintiff, the offer being made "as long as they last;" the defendant had but a small quantity to sell and made the offer to injure the plaintiff's business and not for any legitimate trade purposes. The majority held that no action lay. But Sanborn, J., dissented, saying: "The proposition is sustained by respectable authority; it is just, and I believe it is sound—that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force, if the harm is afflicted without justifiable cause, such as competition in trade. . . . The petition in this case states a good cause of action for interference with and injury to the business of the plaintiff by preventing it from obtaining custom it would otherwise obtain, without any justifiable cause or excuse."

§ 354. **Effect of combination.—Combinations of capital or tradesmen.** May an act which is lawful when done by one individual become unlawful because several combine to do it? The ultimate decision of this question depends upon whether combinations are considered desirable. One view is that at common law the fact of combination is immaterial, and that the only remedy against

(26) 105 Fed. Rep. 163.

combination must be furnished by statutes. In Mogul Steamship Company v. McGregor (27) the defendants, a number of ship owners engaged in the shipping business, formed a combination to drive competitors, of whom the plaintiff was one, from the field. They offered very low rates and besides offered a rebate of five per cent to all local shippers or agents who would deal exclusively with themselves. The court held that the plaintiff was not entitled to a remedy, because any individual ship owner could legally do this, and the fact that several combined to do it did not make it unlawful.

In Scottish Society v. Glasgow Association (28) the plaintiffs were a cooperative society whose purpose was to reduce the price of meat to the public; one set of defendants was a retail butchers' union which was a business rival of the plaintiffs; the other set of defendants were cattle or meat salesmen who dealt in American and Canadian meat and controlled that market. The butchers' union induced the meat salesmen not to sell to the plaintiff by threatening not to buy anything from the salesmen if they did. The court, following the Mogul Steamship case, held that the plaintiff was not entitled to recover, saying: "It is a very serious matter that one of the gates of the country, so to speak, should be closed against a considerable class of the people, and that the trade in foreign meat should be somewhat artificially diverted and confined. I do not know whether harm is caused or not; but if there be, I am unable to see that it

(27) 23 Q. B. D. 598.

(28) 35 Scottish Law Reporter, 645.

can be remedied as matters stand, except by legislation; unless, indeed, the butchers' combination can be met by some counter plan, or can be checked by the force of public opinion."

§ 355. **Same: Another view.** Another view is that there should be a remedy at common law in cases of combination, because it is usually impossible for one to protect himself against several combined where he would be able to deal successfully with them individually. This view proceeds upon the ground that the continuance of competition is desirable.

For instance, in Jackson v. Stanfield (29) a combination of retail lumber dealers refused to buy of a wholesaler who sold directly to consumers or lumber brokers, of whom plaintiff was one. The wholesaler was thus coerced not to sell to plaintiff, whose business was thus injured. He was allowed to recover damages against members of the combination of retailers.

In many states such combinations are forbidden by statute, but, where not, probably more states permit a business combination of this character than would hold it illegal.

§ 356. **Same: Combinations of labor.** Where combinations of labor are engaged in a genuine competitive struggle—not a boycott—the most vital question is their right to strike for a "closed shop" as against the rights of non-union men. Just as a combination of capital or tradesmen seeks an exclusive market by refusing to deal at all with those who deal with their competitors, so a

(29) 137 Ind. 592.

labor union seeks to exclude from employment non-union competitors by refusing to work at all for an employer who will not accept their services exclusively. If non-union men are thereby discharged may they recover damages against the union members who exercised this coercion upon the employer? There is the same sharp division of opinion among the courts here as is to be expected upon any bitterly contested social and economic question where much is to be said upon both sides. Several states, including Massachusetts, Pennsylvania, Maryland, Illinois, and perhaps Maine, hold a strike for a closed shop illegal as against non-union men whose discharge is thereby compelled (30). Others, including New York, New Jersey, Indiana, Minnesota, England and Canada, hold such a strike legal, when peaceably conducted (31).

§ 357. **Same: A third possible view.** Still another view is that there should be no remedy either by common law or statute merely because of the combination; that combinations, both of capital and labor, are natural products of our economic development, and should be protected as well as controlled. This view has not yet been adopted by any courts, though it has been strongly expressed by some economists and judges. The most forcible presentation of it is found in the dissenting opinion of Justice Holmes in Vegelehn v. Guntner (32) a quotation from which follows:

(30) Berry v. Donovan, 188 Mass. 353; Erdman v. Mitchell, 207 Pa. 79.

(31) Nat. Protective Ass'n v. Cummings, 170 N. Y. 315; Allen v. Flood, (1898) A. C. 1.

(32) 167 Mass. 92.

"I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests.

"So far, I suppose, we are agreed. But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. . . . It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary

and desirable counterpart, if the battle is to be carried on in a fair and equal way."

§ 358. **Importance of motive.—Recent restatement of the question.** There are two antagonistic views as to the importance of malice or motive. The one is that in cases of persuasion, whether between competitors or not, motive is entirely immaterial; that if an act is otherwise lawful it cannot be made unlawful by the existence of a bad motive. On the other hand, during the past fifteen years the whole question of the legality of persuasion has been so restated as to make motive material in many if not most of the cases. As restated, a plaintiff makes out a prima facie tort whenever he shows that the defendant has intentionally caused him damage, and the burden is upon the defendant to show some justification (33). Under this restatement, the right of competition becomes a justification, to be extended only as it is conducive to the public welfare. The advantage of the restatement is that it brings out very clearly the important question at issue; but that question—what is or is not justifiable—is still to be solved.

In Allen v. Flood (34) the plaintiffs were shipwrights and members of a union; they were employed to do woodwork by the day by the Glengall Company; the boiler makers' union objected to shipwrights doing iron work, and finding that the plaintiffs had shortly before been employed to do some iron work, the defendant, walking delegate of the boiler makers' union, threatened the Glengall

(33) 8 Harv. Law Rev. 1-14; Plant v. Woods, 176 Mass. 492.

(34) L. R. (1898) A. C. 1.

Company that unless they discharged the plaintiffs, the boiler makers employed by the Glengall Company by the day would quit work. The Glengall Company thereupon discharged the plaintiffs. The trial court held that there was no evidence of any conspiracy or combination. The jury found that the defendant acted maliciously. The House of Lords held that no action lay because the motive was immaterial and the act was not otherwise unlawful; there was no prima facie tort. Under the new statement of the law as to persuasion above mentioned, the defendant would be considered as having committed a prima facie tort in intentionally causing damage to the plaintiff; this would place the burden of justification upon the defendant.

§ 359. **Present uncertainty of this branch of the law.** In the present state of the law no general rule can be laid down as to the legality of many of the various means employed in a trade or labor dispute. Neither courts nor legislatures are agreed as to how far a combination of laborers or capitalists may go in advancing their interests. Much will depend, in settling the law, upon the drift of public opinion during the next few years. The case of Plant v. Woods (35) typically shows the divergent views. In this case the plaintiffs and defendants were officers and members of rival labor unions; the defendant union which had its headquarters at Baltimore sought by various means to compel the members of the other union, which had its headquarters at Lafayette, Indiana, to join the defendant union. In the case of at least one employer

(35) 176 Mass. 492.

the defendant union threatened to leave off his name from a so-called "fair list" published by the defendant union, unless the employer would cease to employ members of the Lafayette union. The majority of the court, declining to follow Allen v. Flood, held that the plaintiff was entitled to protection against such acts, saying: "We have, therefore, a case where the defendants had conspired to compel the members of the plaintiff union to join the defendant union, and to carry out their purpose have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. . . . Without now indicating to what extent workmen may combine and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow workmen, we think the plaintiffs are entitled to a remedy in this case. The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade. It is true they committed no act of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was

coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. . . . The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws."

Holmes, J., dissented on the ground that while there was a prima facie tort, the defendants were justified, saying: "I agree that the conduct of the defendants is actionable unless justified. I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted. I agree, for instance, that if a boycott or a strike is intended to override the jurisdiction of the court by the action of a private association, it may be illegal. On the other hand, I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants is combined. A sensible

workingman would not contend that the court should sanction a combination for the purpose of inflicting or threatening violence or the infraction of admitted right. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycott and strikes were such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."

DOMESTIC RELATIONS AND PERSONS

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§ 1. **Outline of the subject.** The law of Domestic Relations deals with the rights and duties growing out of such relations as parent and child and husband and wife; for instance, the parent's right to the custody of the child, the parent's duty to support the child, and the parent's right to the child's earnings and services. The law of Persons as such has to do with the modification of various general rules of law when applied to particular classes of persons. Thus, as applied to infants and married women, the usual rules respecting contracts and torts have received some modification. It is important to state these peculiarities. It is convenient to call the subject matter of such statement the law of Persons. The way in which the relation of husband and wife is legally created, and the way in which it may terminate is conveniently

associated with the disability of the wife and the mutual duties and obligations of the wife and husband to each other. The subject matter of this article, then, falls naturally into the following four parts: I. Marriage and Divorce. II. Husband and Wife. III. Parent and Child. IV. Infants.

PART 1.

MARRIAGE AND DIVORCE.

CHAPTER I.

CONTRACT TO MARRY. CONTRACT OF MARRIAGE.

§ 2. **Distinction between contract to marry and contract of marriage.** The contract *to* marry is the agreement preliminary to marriage when the parties are promised in marriage to each other, or betrothed. The contract *of* marriage is the formal ceremony, civil or religious, by which the parties become man and wife. In this chapter is treated the contract *to* marry, and in the succeeding chapter the contract *of* marriage.

§ 3. **Proof of contract to marry.** There is nothing peculiar about this matter. The express contract or promise to marry is proved like other contracts by the express words of the parties, or by circumstantial evidence from their conduct, though without explicit words. When a promise is attempted to be proved from circumstantial evidence, the jury may well be charged as follows:

"The ordinary politeness and civility, which a gentleman extends to a lady, are not to be considered as furnishing any proof of such a promise. The safest rule we can lay down is this: If you find that the attentions which the defendant paid the plaintiff, and the intercourse between them, were such as are usual with per-

sons engaged to be married; and such as are unusual with persons between whom there exists no such relation, they are competent for you to consider as evidence which may or may not, as you may determine, suffice to prove a promise of marriage. It is not necessary for you to consider that there was an express promise made and accepted in terms, but if his conduct was such as to induce her to believe that he intended to marry her, and she acted upon that belief, the defendant permitting her to go on trusting that he would carry the intention into effect, that will raise a promise upon which she may recover. But this must be shown by facts and circumstances, and you cannot consider the understanding of the friends of the parties as to the relation between them'' (1).

In many states there is in force what is known as the statute of frauds, an act requiring all contracts not to be performed within a year to be in writing. It has been held that this applies to a contract to marry, and hence, if it appears that the contract is to be performed in more than a year from the time it is made, no damages can be obtained for a breach, unless the agreement is written (2).

§ 4. **Illegal consideration.** It seems clear that the promise of marriage coming directly or indirectly in consideration of sexual intercourse cannot be enforced; but if the promise to marry is made without any unlawful consideration, and the woman is solicited in consideration

(1) Perkins v. Hersey, 1 R. I. 493.

(2) Ullman v. Meyer, 10 Fed. Rep. 241

of the expectation of marriage to have sexual intercourse with the promisor, and does so, and a child is born, the woman may not only sue for breach of contract, but the additional facts of sexual intercourse, pregnancy, and so forth, will go in aggravation of the damages (3).

Suppose that when the promise is made by the man he is already married. If the woman knows that he is already married, the contract is void by reason of the illegal consideration and cannot be enforced. If the woman is innocent, the man can be sued for breach of contract. If the man offers to perform, the woman can not be required to assist him to commit bigamy, and so must refuse, but may still sue. It is held also that she does not have to wait for the defendant, who is already married, to offer to perform before she sues in tort, but may sue for tort or breach of contract as she pleases (4).

§ 5. **Effect of concealment of facts, or misleading statements.** It seems clear that where one party to the treaty for a contract to marry makes inquiry as to circumstances of family and personal history of the other, and false statements are made knowingly and upon them the contract to marry is entered into, the fraud constitutes a complete defense to the suit for breach of promise. But the courts have gone even farther and held that if one party—let us say the woman—undertakes "without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which

(3) Burke v. Shaver, 92 Va. 345.

(4) Pollock v. Sullivan, 53 Vt. 507.

were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated; and, if she wilfully concealed and suppressed such facts, and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment. . . . Mere silence on the part of the plaintiff, without inquiry by the defendant, though resulting in the concealment of matters which would have prevented the engagement, if known, would not constitute fraud on her part. . . . But a partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, would be as much of a fraud as actual misrepresentation, and in effect would be misrepresentation'' (4a).

§ 6. **Formal requisites of marriage. Common law marriages.** In all jurisdictions there are special statutory provisions relating to the manner in which marriages may be performed. They provide for marriage licenses, a ceremony by some magistrate or clergyman, and the return of the licenses with the report that the marriage has been solemnized. Thus the public records contain the proof of marriages consummated in this manner, and the parties and their issue and family are protected in case any question of the marriage is ever raised. These statutory formalities are scarcely ever made mandatory, that

(4a) Van Houten v. Morse, 162 Mass. 414.

is to say, persons are not obliged to go through the ceremony under the licenses and according to the statute in order to be legally married. Where this construction of the statute obtains there may be what is called a common law marriage. This is merely the agreement of the parties to take each other as husband and wife, at and from the time the agreement is made, or, as the phrase is, "per verba de praesenti." It is very important that the agreement in terms fixes the status of the parties as that of husband and wife *at the very time of the agreement,* for the agreement to become husband and wife in the future, even when followed by co-habitation as husband and wife, will not amount to a valid common law marriage. Hence it is no marriage at all. The reason for this is probably one of public policy rather than any difficulty of legal theory. To allow an engagement with co-habitation to be the same as marriage would open the door too wide to false pretensions and fraudulent marriages. If, however, the contract between the parties is one for a marriage at once, it is no objection to the validity of the marriage that the parties do not hold themselves out publicly as husband and wife, but keep the matter secret. Thus where one entered into an agreement of marriage, to take effect at once, with his housekeeper, the marriage was none the less valid, though the parties kept it secret and were publicly known only as master of the house and his housekeeper. It need hardly be added that the common law marriage is not socially approved.

Suppose A, being already married, falsely represents that a divorce from his first wife has been obtained, and thereupon marries B at a public ceremony. This marriage

is void, for A has a wife already living. Subsequently the divorce of A from his first wife becomes effective, and A and B continue to live together publicly as husband and wife. Are they legally married so that their children are legitimate? The decisions of respectable courts are at variance over this problem. On the one hand, it is urged that the relationship is meretricious in its inception, and mere subsequent co-habitation as husband and wife cannot make a valid common law marriage. On the other hand, it is urged that the man and wife did have a matrimonial intent, although there was a legal obstacle to its being effective, and that the intent with which they originally went through the void marriage continued, so that, when the obstacle was removed and co-habitation continued pursuant to that original, actual, matrimonial intent, there was then and there a marriage. If the void marriage was in fact performed with a real matrimonial intent by both parties in good faith, even though one knew it was ineffective at the time, the latter reasoning seems sound, and is certainly just between the parties. Since the contract of marriage requires the mutual assent of both parties to the marriage, a marriage in jest as a practical joke, whether performed according to the usual ceremony or by mutual promises per verba de praesenti, is no marriage and the court will declare it a nullity.

§ 7. **Effect upon marriage of infancy.** At common law, the age of consent was fixed at fourteen for males and twelve for females. A marriage contracted after both parties had reached that age was valid and binding between them. When both parties to the marriage were over seven and both under the age of consent, a marriage

was subject to be avoided by either of them, after both reached the age of consent. Unless a particular statute clearly requires a contrary construction, a marriage before the age of consent is valid until avoided. The result is that when a girl under the age of consent marries, the girl's parent is not entitled to maintain a writ of habeas corpus against her husband to obtain the custody of the child, so long as she is willing to stay with her husband. When persons who marry are one or both below the age of consent at the time of the marriage, but continue to live together as man and wife after reaching that age, each is precluded from avoiding the marriage. When either party to the marriage is under seven, the marriage is said to be an absolute nullity. The reason for these special rules with respect to infants' marriages is founded, of course, upon the necessity of recognizing such marriages in the interest of the issue of the marriage. Rather than bastardize the issue, it is thought best to recognize the validity of the marriage made after the age when children might be born.

§ 8. **Same: Insanity.** The marriage of an insane person is said to be absolutely void for want of capacity to perform the legal act of making a contract of marriage, but the insanity which has this effect must be such as causes the reason and understanding of the afflicted person to be so far clouded that he or she is not cognizant of the nature and object of the contract entered into. Thus kleptomania on the part of the wife, even if called insanity, and even if in fact insanity from the pathologi-

cal point of view, is not a ground for avoiding and setting aside the marriage on behalf of the husband (5).

§ 9. **Same: Impotence.** The mere fact that one of the parties to the marriage is incapable of bearing or begetting children and that such condition is incurable is no ground for annulling the marriage. Thus a man marrying a woman whose ovaries have been removed and whose inability to bear children is therefore incurable has no ground for the annullment of the marriage; but where the physical defect of one of the parties at the time of the marriage is such that sexual intercourse is impossible, and the defect is incurable, the marriage will be annulled. Thus in one case the marriage was annulled where the rudimentary character of the female's sexual organs and their imperfect condition not only rendered conception impossible but deprived her of any capacity for vera copula—i. e., the act of generation in its ordinary and natural meaning (6).

The fact that one of the parties to the marriage is impotent through old age merely will, it is believed, incline the court against annulling the marriage on any ground of impotence.

§ 10. **Same: Consanguinity of parties.** This is regulated in this country and England by statutes in which the degrees of relationship, in which marriage is prohibited, are defined. In England only persons more nearly related than first cousins are prohibited from marrying. In only a few states in this country are first cou-

(5) Lewis v. Lewis, 44 Minn. 124.

(6) G———— v. G————, 33 Md. 401.

sins prohibited from marrying. Marriages within the prohibited degrees are now made absolutely void in England and in most states. Formerly in England, and still in some states in this country, such marriages are valid until voided. An escape from some of the prohibitions imposed on the marriage of persons nearly related in blood is not difficult. Suppose a nephew desires to marry his mother's sister and she consents. He can find some state where such a marriage is at least valid until avoided; he may then acquire a bona fide residence in that state, and there marry. The validity of the marriage must be determined by the law of the state where it was made, especially if that is also the domicile of the parties. The marriage, thus made and valid until avoided by the law of the state where made, will be recognized in all jurisdictions even though such a marriage is prohibited and made void by the law of the jurisdiction which is asked to recognize it (7). Of course, if the marriage is between brother and sister, or parent and child, it is regarded as incestuous by "natural law" as the phrase goes—that is, it is so repugnant to all the ordinary feelings of individuals that it will not be recognized anywhere outside of the place where such a marriage may be permitted.

§ 11. **Same: Fraud.** In allowing fraud and concealment of facts as a ground of defense to an action for breach of promise of marriage, the courts have, as we have seen, gone very far, but where the marriage has once occurred and been consummated, there is great reluctance

(7) Sutton v. Warren, 10 Met. (Mass.) 451.

toward setting it aside. It is well settled that co-habitation after the fraud is disclosed will prevent the setting aside of the marriage.

The courts have passed upon some particular sorts of fraud which warrant the setting aside of a marriage. Thus it has been held that "pregnancy before marriage, concealed from the husband, who has not, previous to marriage, sustained improper relations with the wife, is a fraud which is sufficient ground for annulling the marriage, if the discovery of the fact is followed by a cessation of co-habitation and abandonment" (8). This rule has, however, been denied in a recent English case (9).

In a recent Massachusetts case the court annulled a marriage which had not been consummated by sexual intercourse because the husband was afflicted with an incurable and loathsome venereal disease which made co-habitation impossible and which was concealed from the wife before marriage. The court proceeded with great caution, however, in going so far, and insisted that the disease must be incurable and such as to prevent co-habitation, that no co-habitation should have occurred, and that the wife should claim the advantage of the facts at once upon discovery (10).

§ 12. **Duress.** The consent to marriage, obtained by such physical force or threats of physical violence as to overwhelm the will of one of the parties thereto, causes the marriage to be invalid. The law hardly goes farther

(8) Harrison v. Harrison, 94 Mich. 559.
(9) Moss v. Moss, L. R. (1897) P. D. 263.
(10) Smith v. Smith, 171 Mass. 404.

than this in formulating a rule. It is often a difficult task, requiring the long and patient labor of an expert trial lawyer actually examining witnesses, to determine whether in a particular case a marriage is invalid on the ground of duress. The fact that the marriage was never consummated by co-habitation is often an important fact tending to corroborate evidence of duress. By the same course of reasoning the voluntary consummation of the marriage after the removal of the alleged coercion, would tend to prove the absence of coercion. Where it appears that a man marries a woman by way of reparation for the wrong done her, and that this is a distinct motive for his act, it is no ground for the annulment of the marriage that he acted reluctantly, or that he may have been somewhat influenced by threats of violence (11). The ultimate issue of fact is always whether the marriage was entered into by reason of violence or threats of violence, and without any real consent.

§ 13. **Recognition elsewhere of marriages valid where entered into.** Clearly it is highly important that when one is married in one state, its validity be recognized in all other states. Husbands and wives do not wish to find themselves living in adultery together while traveling and subject to the criminal laws of a foreign state for so doing. The general rule is that a marriage which is valid by the laws of the place where celebrated is valid everywhere. This general rule has its exceptions, and one is that where the marriage is contrary to the positive

(11) Honnett v. Honnett, 33 Ark. 156; Todd v. Todd, 149 Pa. St. 60.

statutes of the state where it is sought to be enforced, it will not be recognized. The question of the existence of such a statute is raised where there are acts which forbid the re-marriage of persons who have been divorced within a certain length of time after the degree has been granted—let us say a year from the date of the decree. When a divorce has been obtained by a citizen of a state where such a prohibition exists, and such citizen and another citizen of the same state leave their domicile and enter another jurisdiction for the express purpose of being there married, and thereby defeating the prohibition of the statute of the state of which they are citizens and in which they are domiciled, there is authority that the state of the domicile and citizenship of the parties will not enforce the marriage or regard it as a valid one (12). In that state the parties will, when they return, be living in unlawful co-habitation. Other states have confined the operation of such statutes to a prohibition of re-marriage in the state where the divorce was obtained, so that the marriage outside that state within the prohibited time will be recognized in the state where the divorce was granted (13). In states where the point has not been adjudicated the ultimate result cannot be predicted with certainty.

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(12) Lanham v. Lanham, 136 Wis. 360; Williams v. Oates, 27 N. C. 535; Pennegar v. State, 87 Tenn. 244.

(13) State v. Shattuck, 69 Vt. 403; Van Voorhies v. Brintnall, 86 N. Y. 18; Wood Estate, 137 Calif. 129.

CHAPTER II.

DIVORCE.

§ 14. **Preliminary considerations.** There is a popular impression that divorces are easy to obtain. If this is practically so, it is because in many cases there is no one to make any contest, or if there is, then the contest is avoided by some arrangement of more or less doubtful propriety.

To the scrupulous lawyer who wishes to avoid even the appearance of evil and of forbidden practices respecting collusion, the slightest appearance of contest on the part of the defendant in the divorce suit is apt to present a difficult situation. It seems that he is practically cut off from any negotiations for settlement and must prepare his case as if there were to be a complete contest. He must first ascertain how long the plaintiff has been a resident of the state, and perhaps the county, where the suit is to be brought. Here difficult questions of fact may at once arise. If the plaintiff has traveled about a good deal, it may be difficult to prove a legal residence for the required time specified in the local statutes of the state where the divorce suit is to be brought, or in any other place where the divorce may be obtained. Usually a divorce is wanted speedily and the lawyer is urged to shave corners to secure the proper legal residence to war-

rant bringing the suit. He must next consider what will be the effect of the divorce in other jurisdictions after it is granted, because, of course, the plaintiff does not wish to be divorced in one jurisdiction and married in all the others. Under some circumstances the most difficult questions with respect to the sufficiency of divorce proceedings arise in pursuing this inquiry. Then the attorney will come to the causes for divorce. He will often find that the complainant has little idea of what they are, or of the evidence that is required to make out even a prima facie case. Frequently it will appear that there is no real cause for divorce, or, if the question is doubtful, that it involves the bringing in of witnesses who are widely scattered and difficult and expensive to secure. If the honest solicitor finds a real cause for divorce he must then consider whether this has been nullified or avoided by any good defense, such as condonation or recrimination. By the time he has proceeded this far he will often have discovered a difficult and doubtful case before him for preparation. Witnesses must be interviewed, evidence sifted, conflicting stories reconciled, and the real facts ascertained. All this will be costly in expenses and fees. The client by this time thinks that getting a divorce is not much like the proceeding usually described in the newspapers or by some friend. Very likely the plaintiff becomes discouraged and drifts away from the office of the honest solicitor, who has always looked after his business and family affairs, and instead employs some well-known firm who make a specialty of representing parties in the divorce courts, and from whom quick results may

be obtained with the least inconvenience. Perhaps this is the reason why most of the better lawyers send out cases of divorce or refuse to take them.

§ 15. **Divorces classified. Causes of divorce in general.** The only sort of divorce which the English courts granted was a partial divorce "from bed and board—a mensa et thoro." Such a divorce deprived the party against whom it was rendered of his or her marital rights, but it did not dissolve the marriage. Such a divorce was granted for two causes only, adultery and cruelty. In this country, however, the subject of divorces is in practically all states regulated by statutes, and divorces are granted solely under the authority of general statutes which specify the grounds for the divorce. These grounds vary considerably in different states—so much so that in states with particularly favorable laws for divorce the "divorce colony" has become a by-word and a source of local profit. The principal grounds specified are adultery, cruelty, and desertion. In some states divorce may be granted for insanity, habitual drunkenness or intemperance, non-support and imprisonment in the penitentiary for crime. The text books sometimes add "and some other grounds." This general phrase covers a multitude of possibilities of which only the examination of many statutes can determine the extent. It is believed, however, that no state has gone so far as the Japanese law which at one time at least, it is said, allowed as one of the causes of divorce the wife's "loquacity," and the "wife's disobedience of her mother-in-law."

§ 16. **Adultery.** Whether a spouse has been guilty of

adultery or not becomes a very difficult question in a case like this: A spouse supposing that the other party to the marriage is dead, or that a valid divorce has been obtained, marries again and it turns out that there was no valid divorce or that the first spouse was not dead. In such a case, it seems possible to take the view that no adultery has been committed. This proceeds upon the ground that to constitute adultery as a ground for divorce the same criminal intent is necessary as is required to constitute the crime of adultery or bigamy, and such criminal intent is negatived by the honest and justifiable belief in facts which, if true, would make the second cohabitation lawful. The party, however, entering into the second marriage believing the divorce from the first spouse to have been valid, or the first spouse be dead, had best be careful because the honest belief in the facts which would make the second marriage legal must be "justified." Negligence will supply the place of "bad faith." Thus where a man married again before the decree of divorce had become final according to its terms, his honest belief did not save him from being guilty of adultery. His neglect to take account of the data at hand supplied the place of bad faith (1). Where a woman was advised by a justice of the peace that she had obtained a divorce and could marry again, and in fact the divorce was invalid, she was guilty of adultery in living with her supposed second husband (2). It should be noted also that some courts announce a rule less liberal

(1) Moors v. Moors, 121 Mass. 232.

(2) State v. Goodenow, 65 Me. 30.

than the one above suggested, and declare that the mistake of the party going through the second marriage in the honest and perhaps justifiable belief that the decree of divorce has been rendered, does not prevent the innocent party being guilty of the crime of bigamy, and consequently adultery. These courts proceed upon the ground that the mistake was one of "law" and that a "mistake of law" furnishes no excuse for the offense actually committed.

§ 17. **Cruelty.** There are three different sorts of cruelty specified in the statutes as causes for divorce: (1) cruelty; (2) extreme cruelty; and (3) extreme and repeated cruelty, which requires at least two acts of cruelty.

Extreme cruelty requires (a) an act or acts of physical violence by one spouse toward the other; (b) not justifiably provoked by any conduct of the other; and (c) of such a nature when viewed in the light of circumstances immediately surrounding the acts of violence themselves, and the whole conduct of the spouse accused of cruelty, as to raise on the part of the complaining spouse the reasonable apprehension of bodily hurt, and to show a state of personal danger incompatible with the duties of married life.

Assuming that for extreme cruelty there must be an act of physical violence, unprovoked, it should be observed that it is not every sort of physical encounter between husband and wife that furnishes a ground for divorce. The acts of physical contact must be such as to raise a reasonable apprehension of bodily hurt. They must show

a state of personal danger incompatible with the duties of married life. When the acts do not speak for themselves in showing this character—as where the physical contact is slight and produces no real hurt—it becomes especially necessary to show the character of the act by going into all the surrounding circumstances of the defendant's conduct, such as striking in ungovernable passion or while drunk. Courts have often sanctioned the proof of abusive language and the calling of the wife unchaste to show the character of the acts of violence.

There is also the question whether for extreme cruelty some physical violence is absolutely necessary, or whether it is not enough that such was threatened so as to create "in a mind of ordinary firmness" the reasonable apprehension that the threats might be executed. Probably such threats would be sufficient, but threats of personal violence, not of that character, have been held not to come up to the definition of extreme cruelty. As one judge has said:

"To the exceptionally sensitive and timid wife, put in actual and constant fear of limb or life by conduct not calculated to have that effect on a person of normal and ordinary sensibility, the law of divorce afforded no relief. The infliction of mere mental pain, however seriously it might injure health or endanger reason, was not legal cruelty. A husband might violate all the proprieties and decencies of social life; he might call 'his virtuous wife a strumpet, saying so not to herself alone, but before everybody,' although 'as far as suffering was concerned he had better kick her.' He might bring prostitutes into his

family and seat them at his table,—make his house a brothel, and the law, if it would justify the wife in leaving him, afforded her no other remedy. For such conduct as that described in W— v. W—, (3), and the injury caused to 'her health by its effects upon her feelings,' the wife was then in New Hampshire, as she is now in Massachusetts, remediless. Constant, innumerable, and nameless indignities of speech and action, each possibly petty in itself, might cause mental anguish less endurable, more hurtful to physical well-being, and more likely to overturn reason, than any degree of pain produced by blows; they might make life intolerable and death welcome, yet they were not legal cruelty. The sufferer's only remedy was 'by prudent resistance,' and 'by calling in the succors of religion and the consolations of friends' " (4).

Clearly it is no easy matter to prove extreme cruelty in many cases.

When the statutes make mere cruelty a ground for divorce, it is possible that some further relaxation in respect to the circumstances which would furnish the ground for divorce will be found. Threats of physical violence at least must exist, but they might amount to cruelty as distinguished from extreme cruelty, when the conduct of the spouse accused of the cruelty was such as to place the other in actual fear of physical violence, though a person of ordinary firmness of mind might not be.

§ 18. **Desertion.** To constitute desertion there must

(3) 141 Mass. 495.

(4) Robinson v. Robinson, 66 N. H. 600.

be (1) the actual breaking up of the matrimonial cohabitation; (2) with intent to desert; (3) against the will and without the consent of the other party; and (4) without legal excuse. The legal excuse for the breaking up of the matrimonial cohabitation is such conduct at least as would justify, in the sound discretion of the court, a living apart. It follows that a wife who without cause refuses to follow her husband when he, in good faith, changes his domicile is guilty of desertion. It is generally held, however, that the mere refusal of one of the parties to the marriage to have sexual intercourse while both continue to live together under the same roof is not desertion—sexual intercourse being considered one of the several elements of matrimonial cohabitation and desertion requiring the interruption of all (5).

A desertion which furnishes a ground for divorce is frequently required to last a given length of time, for instance, two years. Suppose, after committing a wilful desertion without reasonable cause, and before the expiration of the two years, that the offending party in good faith and with an honest intent to resume marital relations, returns or offers to return to the other. Is the continuity of the desertion broken? At least one reputable court has answered this question affirmatively (6). This seems sound, for the offending party who repents within the two years and attempts to cease the desertion would by this means interrupt the continuity of his wrongful act.

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(5) Watson v. Watson, 28 Atl. Rep. (N. J.) 467.

(6) Albee v. Albee, 141 Ill. 550.

Again, where the desertion is required to last during a specified time, suppose that the husband and wife have sexual intercourse at the place of abode of the offending party during that time, does that break the continuity of the desertion? It seems not, for the desertion being the total breaking up of all matrimonial cohabitation, the resumption of anything less than the whole matrimonial cohabitation will not overcome the continuity of the desertion (7).

§ 19. **Defenses to a suit for divorce: Condonation.** An adultery is condoned if the parties live together subsequently with full knowledge of the adultery on the part of the one who is innocent. The condonation of one adultery which is disclosed is not, however, the condonation of another which is not. Furthermore there is no condonation unless, upon the forgiveness of the offending party, the offense ceases. When therefore there is forgiveness of a desertion by the husband having sexual intercourse with the offending wife at her place of abode, but there is no act on the part of wife restoring the full matrimonial cohabitation, there is no complete condonation unless it appears that the husband expressly forgives without the necessity of the wife's returning—a state of facts not to be inferred from the mere act of sexual intercourse (8).

When a condonation is complete it is always subject to be avoided by the repetition of misconduct by the offending party. Thus if subsequently to the acts relied upon as

(7) Danforth v. Danforth, 88 Me. 120.

(8) Note 19, above.

a condonation, the offending party be guilty of another act of the same sort, or perhaps even uses foul and abusive language, the condonation is avoided. It seems probable that acts which would not in the beginning be sufficient to furnish a cause of divorce will be sufficient to avoid a condonation. Some courts have gone even farther in announcing and applying the broad rule that condonation will be avoided by any conduct on the part of the offending husband which the court, in its sound discretion, deems unbefitting in a husband toward his wife. But so broad a rule must be taken with a great deal of caution, as other decisions by the same court may show a perceptible reaction against such a statement. If the original cause for divorce be cruelty, the safe rule might be thus stated to a wife: Such conduct as on former occasions has led to physical violence and which leads the wife reasonably to fear a repetition of acts of physical violence is sufficient to avoid the defense of condonation arising from her having continued to live with the husband. Thus if the use of opprobious epithets, in such a threatening manner that the wife is forced to leave the room of the husband and wife in the night time and seek protection in the room of her mother, is of a character to make it possible for the wife justly to conclude that the abusive language and threatening attitude would be followed, as on former occasions, with personal violence, the condonation is avoided and the wife may leave her husband and file her bill for divorce relying upon the original ground of cruelty. The same may be said of fits of violent and unprovoked passion which on former occasions have been

accompanied by physical violence. Should they continue as before and be of such a degree of violence and accompanied with such actions as reasonably causes the wife to apprehend that physical violence may again follow, causing her to retreat from her husband to avoid the threatened violence, then also the condonation will be avoided.

It is said by courts that it will take much more to avoid the husband's condonation than the wife's. This is fair because of the wife's greater dependence.

§ 20. **Same: Connivance.** Connivance is the consent of the complaining party to the misconduct which is alleged as the grounds for divorce. It occurs as a defense generally in cases of adultery. Wherever the husband has been guilty of conduct which contributed to the wife's fall and to her adultery, he cannot have a divorce. As the matter has been picturesquely put, "the husband is not obliged to throw obstacles in her way, but must not smooth her path to the adulterous bed." Providing he does not do the latter, the husband will not be deprived of a divorce, though he is willing and anxious to catch his wife committing adultery and takes no steps to prevent her carrying out her own adulterous plans (9).

§ 21. **Same: Collusion.** It is clear that there is no impropriety in a husband making his wife a reasonable allowance while suit is pending in order to save the expense of an application for alimony. On the other hand the divorce must be denied if the transaction amounts

(9) Wilson v. Wilson, 154 Mass. 194.

to this, "I will give you this money if you will not oppose the suit for divorce." It is collusion to obtain a divorce by buying off the defense.

There can be no doubt that much of the bad repute attaching to divorce arises from transactions of this sort. The difference between getting a divorce, or not, may depend upon whether it is defended or not. The difference between being required to spend much money in obtaining a divorce, with the accompanying publicity of scandalous details, and obtaining it quietly and cheaply will often depend upon whether it is a default case or not. The temptation is overwhelming to obtain cheap, quiet, and certain results by paying money direct to the opposite party. There is no doubt that a successful practice in the divorce courts of many American states is greatly aided by the ability of the lawyer to cool the ardor of defendants who propose to defend.

§ 22. **Same: Recrimination.** This defense is that the plaintiff is also guilty of misconduct constituting a cause of divorce. It is immaterial whether the recriminatory charge is the same cause for divorce as that of the plaintiff, or not. Thus where the plaintiff sued for divorce on the ground of the adultery of the wife, and the wife replied charging the husband with cruelty, and both charges were proved, neither could have a divorce.

§ 23. **Alimony: In suit for divorce.** The court in which the suit for divorce is brought may compel the husband to pay a sum to the wife for her support and maintenance pending the suit, and to enable the wife to prosecute or defend her suit. This is called temporary

alimony and solicitor's fees. In the final decree in which the wife obtains the divorce from the husband, the latter may be ordered to pay permanent alimony for the support of the wife. This allowance may include support for the children and the amount may be increased or diminished as exigencies may thereafter require. The right to alimony ceases usually on the death of the husband or the wife. It may be, but is not necessarily, cut off by the remarriage of the wife or by her subsequent misconduct.

In fixing the amount of alimony it has been held in some states that the court, in the proper exercise of its discretion, should be guided not by the amount of the husband's capital so much as by the amount of his income. Thus where the husband's capital is tied up in unproductive real estate, the amount of alimony is to be estimated with reference to the income and not the capital (10). Furthermore, the need for alimony must appear on the part of the wife, and where she had as much or more property than the husband, and it had recently been derived from the husband, her application for alimony was denied (11).

Since the duty to pay alimony grows out of the duty to support, it has been said that the husband cannot have alimony from his wife.

§ 24. **Same: In suit for separate maintenance.** By statute in most states, a wife living apart from her husband without her fault can maintain a suit for alimony without asking for, or being obliged to include, a prayer

(10) Heninger v. Heninger, 90 Va. 271.

(11) Haddon v. Haddon, 36 Fla. 413.

for divorce, and without being obliged to prove such facts as would furnish a ground for divorce. In some states such a suit can be maintained without the aid of any statute, on the ground that it is merely a proceeding to enforce the husband's legal duty to support the wife where by his own fault she is forced to live apart from him (12). In most states probably such a suit cannot be maintained unless specially authorized by statute (13).

§ 25. **Custody of children.** In suits for divorce, the courts are practically always given full authority to dispose of the custody of the children as their welfare may demand. Very young children are usually given to the exclusive custody of the mother, even though she may be somewhat in fault, providing she is a suitable person to have any control at all of the children. Even the husband who is in fault is not usually wholly cut off from the association and custody of his children.

§ 26. **Separation agreements between husband and wife.** Whether the agreement to live separate and apart be valid or not, it is believed that so much of the agreement as relates to the property rights of the parties and to the support and maintenance of the wife by the husband during separation is valid and enforceable. In this country it is believed that agreements for a future separation are regarded as contrary to public policy and unenforceable. It is possible that contrary results have been reached by the English courts.

§ 27. **Effect of divorce decree: In jurisdiction ob-**

(12) Golland v. Golland, 38 Calif. 265.

(13) Trotter v. Trotter, 77 Ill. 510.

tained. In the jurisdiction where the decree of divorce is obtained, the decree receives full recognition and force so far as the dissolution of the marriage is concerned. It is effective indirectly to bar the defendant of all rights of dower or curtesy. The wife who secures a divorce because of the husband's fault is clearly not his wife at the time of his death so as to be entitled to any distributive share of his estate.

§ 28. **Same: In other jurisdictions.** Where a divorce is rendered in the state of the domicile of both parties, frequently called the matrimonial domicile, and after personal service upon the defendant, it is recognized everywhere.

Suppose a decree is rendered in a jurisdiction in which the party suing for divorce had a domicile with the other party, i. e., the jurisdiction of the matrimonial domicile, but the defendant having removed from the state can be served only by publication and not personally. It is now generally settled that such a divorce will be recognized in other states. In New York the opposite doctrine was announced, but the Supreme Court of the United States declared that by virtue of that clause of the Constitution which provides that full faith and credit shall be given in each state to the judicial proceedings of every other state, the decree must be recognized in other states (14).

Suppose a decree is rendered in the jurisdiction in which the party suing for divorce has obtained a new domicile. If the defendant appears and submits to the

(14) Atherton v. Atherton, 181 U. S. 155.

jurisdiction of the court, the decree, it is believed, will at least be binding between the parties and cannot be impeached anywhere by either of them. If the defendant does not appear and does not submit to the jurisdiction of the court, as is the usual case where he is served only by publication, the courts of the state where the parties had their matrimonial domicile, in one striking instance at least, refused to recognize the decree of the foreign state and this position is held not to be in contravention of the Constitution of the United States. These are the results reached in the recent famous case of Haddock vs. Haddock decided by the United States Supreme Court in 1906 (15). The matrimonial domicile of the parties to that litigation was in New York. The husband left New York, abandoning the wife without just cause, and acquired a new domicile in Connecticut while the domicile of the wife remained in New York. The husband then obtained a divorce in Connecticut, according to Connecticut laws. The wife did not appear in the Connecticut suit. She subsequently obtained a divorce and alimony in the New York courts. In this second divorce suit it was held: (1) that, under the law of New York, the courts were not required to notice or give effect to the decree of the Connecticut court; (2) that the United States Constitution which requires each state to give full faith and credit to the judicial proceedings of every other state did not require the New York courts to recognize the Connecticut decree.

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(15) 201 U. S. 562.

It should be observed that upon the first point the New York courts stand almost alone. Almost all states of the Union concede the right of one of the parties to the marriage to acquire a new domicile, apart from the matrimonial domicile, which will give the courts of the jurisdiction where the new domicile is acquired authority to grant a decree of divorce which the courts of other states will respect. Where, however, New York is the matrimonial domicile, it is safe to say that any divorce obtained by either party upon acquiring a new domicile in another state and there obtaining a divorce without the defendant appearing, is not entitled to have that decree recognized *in the state of New York*. The United States Supreme Court refuses also in Haddock vs. Haddock to require the state of New York to recognize such a decree, provided the plaintiff, obtaining the first divorce outside of the matrimonial domicile, is guilty of a wrongful abandonment of the defendant. This would seem to make the issue of wrongful abandonment of the defendant by the plaintiff, in the suit outside the matrimonial domicile, a jurisdictional fact which is not concluded in any way by the decree in the first divorce suit finding that the complainant was not in default. Such seems to be the decision of the United States Supreme Court.

The results logically flowing from the decision in Haddock vs. Haddock appear rather startling. Thus Mr. Haddock, after the Connecticut divorce and before the New York divorce, was a single man in Connecticut and might lawfully marry there a second wife; while in New York he was married to his first wife, and, if he lived in

New York with his Connecticut wife, he would be living in adultery with another woman. So long as he kept his second wife in Connecticut and had made up with his first wife in New York, there would seem to be no legal difficulty in his having two wives and living with each of them, as he pleased, in New York and in Connecticut respectively. Now suppose both wives and Mr. Haddock had met together in New Jersey. What would have been the status of the parties? Would the New Jersey court recognize the Connecticut decree or not?

PART II.

HUSBAND AND WIFE.

§ 29. **Introductory: Historical evolution of the subject.** During the last sixty years the law of husband and wife has gone through an evolution which has eliminated from the law a great deal that was once highly important. In most states until the middle of the nineteenth century, the law of husband and wife, especially with reference to the property rights of the wife, consisted of one set of rules which were acted upon by courts of law, and another set, to a considerable extent modifying the first, which were administered by courts of chancery or equity. About the middle of the nineteenth century many states in this country modified by statute the rules applied in the courts of law, along the lines laid down by the courts of equity. These statutes were in terms of partial effect only, and many nice and difficult questions of their indirect effect were raised. A typical example of this half-way legislation is to be found in the Illinois act of 1861. Hereafter constant reference will be made to this act in discussing its effect and the effect of other acts like it in changing the rules of law as they had theretofore existed. Most states at a substantially later time passed complete reform legislation which completely swept away so much of the old law as was unadapted to modern conditions. In

Illinois, which is chosen as a typical jurisdiction, the complete reform came in 1874, and its final effect in disposing of the remnants of the old law left by the act of 1861 will be hereafter particularly referred to.

It will be thus observed that a great many topics of the law of husband and wife must be considered in four stages: (1) At common law; (2) in equity; (3) under the halfway statutes; and (4) under the complete reform legislation. The first two stages are of general interest and applicable to all jurisdictions alike, where the law is founded upon the common law of England. It is, however, practically impossible to deal with the latter two stages in this article in any other than a specific manner. To this end it is necessary to take the specific legislation of a particular, and it is believed, a typical jurisdiction. The reader will, therefore, understand that while considering how the old law was altered by the Illinois act of 1861 and also by the Illinois act of 1874, he is in fact simply acquiring general information as to the manner in which the law of this subject has evolved in the various states of this country.

CHAPTER III.

USE AND CONTROL OF MARRIED WOMEN'S PROPERTY.

§ 30. **At common law: Chattels, choses in action, and real estate.** All chattels owned by the wife became at once on her marriage the property of her husband. All chattels which were transferred to the wife after marriage became in the same way the property of her husband. The wife's choses in action—such as her bank account and promissory notes—the husband had the right to reduce to his possession—or sue upon and collect—in his lifetime. If he failed to do so, however, they remained the property of the wife. As to the wife's real estate, that became at once upon her marriage subject to the interest of her husband "in the right of his wife" as it was called. This was an estate in the whole of the wife's real estate during the life of the wife. Any real estate which came to the wife after her marriage, and was not made her "separate estate" as hereafter described was equally subject to this life estate of the husband. This life estate of the husband in the right of his wife must be distinguished from the husband's estate by the "curtesy." The latter took effect, if at all, only after the wife's death and then only if there had been issue born of the marriage.

§ 31. **Modifications of the common law worked out by**

the court of chancery. This topic has, it is believed, been put so clearly and interestingly by Professor Dicey in his recent work entitled "Law and Opinion in England During the Nineteenth Century," that his account is here given:

"In 1800 the Court of Chancery had been engaged for centuries in the endeavour to make it possible for a married woman to hold property independently of her husband, and to exert over this property the rights which could be exercised by a man or an unmarried woman. Let it, however, be noted, that the aim of the Court of Chancery had throughout been not so much to increase the property rights of married women generally, as to enable a person (e. g. a father) who gave to, or settled on a woman, to insure that she, even though married, should possess it as her own, and be able to deal with it separately from, and independently of, her husband, who, be it added, was, in the view of equity lawyers, the 'enemy' against whose exorbitant common-law rights the Court of Chancery waged constant war. By the early part of the nineteenth century, and certainly before any of the Married Women's Property Acts, 1870-1893, came into operation, the Court of Chancery had completely achieved its object. A long course of judicial legislation had at last given to a woman, over property settled for her separate use, nearly all the rights, and a good deal more than the protection, possessed in respect of any property by a man or a feme sole. This success was achieved, after the manner of the best judge-made law, by the systematic and ingenious development of one sim-

ple principle—namely, the principle that, even though a person might not be able to hold property of his own, it might be held for his benefit by a trustee whose sole duty it was to carry out the terms of the trust. Hence, as regards the property of married women, the following results, which were attained only by degrees.

"Property given to a trustee for the separate use of a woman, whether before or after marriage, is her separate property—that is, it is property which does not in any way belong to the husband. At common law indeed it is the property of the trustee, but it is property which he is bound in equity to deal with according to the terms of the trust, and therefore in accordance with the wishes or directions of the woman. Here we have constituted the 'separate property,' or the 'separate estate' of a married woman.

"If, as might happen, property was given to or settled upon a woman for her separate use, but no trustee were appointed, then the Court of Chancery further established that the husband himself, just because he was at common law the legal owner of the property, must hold it as trustee for his wife. It was still her separate property, and he was bound to deal with it in accordance with the terms of the trust, i. e., as property settled upon or given to her for her separate use" (1).

§ 32. Under the Illinois act of 1861: The act and its effect. The Illinois act of 1861, known as the first married women's act, was as follows:

"All the property, both real and personal, belonging to

(1) A. V. Dicey, Law and Opinion in England, pp. 373-375.

any married woman as her sole and separate property, or which any woman hereafter married, owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person, other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband.

Under this act the chattels which the wife had when she was married or which were afterwards transferred to her, were hers, subject to no rights of her husband. She also had full power to alienate her sole and separate property. The same rule applied to choses in action, e. g. her bank account and promissory notes. Under this act the wife had full power to make leases of her real estate without her husband joining. The statute gave the married woman full power to sue in her own name so far as her separate estate was concerned.

§ 33. **Under the act of 1874: Effect of the act.** The later legislation confirmed all that had been accomplished by the previous act of 1861.

§ 34. **Husband's right as the administrator of his wife's estate.** At common law the husband not only had the right to be the administrator of his wife's estate, but he was privileged as such to get in all the personal assets

and to retain them as his own. Even in equity, when the wife had a "separate estate" in the hands of a trustee, the husband's right as his wife's administrator to get in the estate for himself which was in the hands of a trustee was not cut off and the distribution was to the husband absolutely. These rules were regarded as changed in this country at a very early date by the various statutes of distribution, which provided for the descent and distribution of intestate estates (2). Under them, while a husband was still permitted to be the administrator of his wife's estate, he was obliged to distribute according to the statute. This change occurred long before the so-called married women's acts, and was therefore entirely independent of them.

§ 35. **Earnings of wife.** At common law the earnings of a married woman during coverture belonged to her husband. Under the Illinois act of 1861 and acts like it, this rule in general remained the same (3), though at least one court has thought there was enough in a somewhat similar statute to warrant holding that the rule which gave a husband a wife's earnings had been abolished (3a). In Illinois a special act was passed in 1869 depriving the husband of the right to his wife's earnings. To this act, however, a proviso was added that it should not give the wife any right to claim compensation for services rendered her children or husband. It has been held by

(2) Leakey v. Maupin, 10 Mo. 368.

(3) Merrill v. Smith, 37 Me. 394.

(3a) Meding v. Urich, 169 Pa. St. 289.

courts in other states that the result provided for by this proviso was the law without any proviso (4).

§ 36. **Estates by entireties.** At common law if an estate in fee be granted to a married man "and his wife," they are neither joint tenants nor tenants in common. Both are seized of the entire estate. Neither can dispose of it without the joining of the other in the conveyance, and upon the death of one the whole estate remains to the survivor. This estate is called "an estate by the entirety." Statutes passed at a very early date in most states providing that estates given to two persons jointly should be held by them as tenants in common, unless it were expressly stated that they should hold as joint tenants, were held to have no effect whatever upon an estate by the entirety, since that was neither tenancy in common nor joint tenancy (5). The Illinois act of 1861, however, by its indirect effect, made a change in the rule concerning the creation of estates by the entirety. After that act the mere conveyance to a husband and wife did not make an estate by the entirety, but both held as tenants in common (6). Under the later and more complete married women's acts the same result naturally obtained, but it was still by the indirect effects of the later acts rather than by any direct provision. The interesting question still remains, however, whether if the grantor ex-

(4) Blaechinska v. Howard Mission, 130 N. Y. 497.

(5) Den d. Hardenbergh v. Hardenbergh, 10 N. J. L. 42.

(6) Cooper v. Cooper, 76 Ill. 57; Mittel v. Karl, 133 Ill. 65; Walthall v. Goree, 36 Ala. 728. Contra: Diver v. Diver, 56 Pa. St. 106.

pressly indicates his intent that the husband and wife shall hold an estate by the entirety, such an intent can be given effect. In New York and some other states, estates by the entirety have been held wholly unaffected by married women's acts (7).

(7) Hills v. Fisher, 144 N. Y. 306.

CHAPTER IV.

MARRIED WOMEN'S CONTRACTS AND TRANSFERS OF PROPERTY.

Section 1. Contracts.

§ 37. **At common law.** Contracts of a married woman were void at common law in the most extreme sense. They were unenforceable against the married woman. They could not be affirmed by her after coverture ceased. Third parties could collaterally treat them as nullities. In some states it is believed there was a slight relaxation from this rule before any statutory changes, where the wife was deserted by her husband. This, however, was a distinct innovation upon the common law and not countenanced where its rules were more strictly adhered to.

§ 38. **In equity.** The power of a married woman to charge her separate estate in equity is thus described by Professor Dicey:

"Equity never in strictness gave a married woman contractual capacity; it never gave her power to make during coverture a contract which bound herself personally. What it did do was this: it gave her power to make a contract, e. g. incur a debt, on the credit of separate property which belonged to her at the time when the debt was incurred, and it rendered such separate property

liable to satisfy the debt. Hence two curious consequences. The contract of a married woman, in the first place, even though intended to bind her separate property, did not in equity bind any property of which she was not possessed at the moment when she made the contract, e. g. incurred a debt. The contract of a married woman, in the second place, if made when she possessed no separate property, in no way bound any separate property, or indeed any property whatever of which she might subsequently become possessed. W, a married woman, on the first of January, 1860, borrows £1,000 from A on the credit of her separate property, which is worth £500. A week afterwards W acquires, under her father's will, separate property amounting to £10,000. The £500 she has meanwhile spent, the £10,000 is not chargeable with her debt to A. Let us suppose a case of exactly the same circumstances except that when W borrows the £1,000 from A she is not possessed of any separate property whatever, but tells A that she expects that her father will leave her a legacy and that she will pay for the loan out of it. She does, as in the former case, acquire a week after the loan is made £10,000 under her father's will, and acquires it as separate property. It is not in equity chargeable with the debt to A'' (1).

Under the English cases it seems the married woman's estate might be charged whenever it was right and just that it should be, and in the absence of any particular intent to charge her estate, while under the American cases an intent to charge was usually required.

(1) A. V. Dicey, Law and Opinion in England, pp. 379-380.

§ 39. **Under the act of 1861.** Under this act the courts became much confused as to how far the married woman could contract and be personally liable upon her contracts. It was held that a married woman was liable in a suit at law for work done on her separate estate, and also for goods sold to her in the carrying on of her business of keeping a grocery store, but where she purchased land which, thereupon, became her separate estate, she could not be sued for the purchase price at law, but could in equity.

§ 40. **Under the act of 1874.** The act of 1874 made a clean sweep, providing that "contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner as if she were unmarried." One exception is added that she should not enter into or carry on any partnership business unless her husband has abandoned her, or deserted her, or is idiotic or insane, or is confined in the penitentiary. Under this act the married woman was liable even though she went surety for her husband. In many states the statutes specifically except the married woman from any liability where she goes surety for her husband, but such acts are very easily gotten around by the wife contracting for whatever the husband wants as a principal and then handing over to her husband what she has purchased as principal. But in one jurisdiction at least the statute was broad enough to save the wife from liability where this subterfuge was resorted to, provided

the person with whom the wife was contracting had notice of what was being done (2).

Section 2. Conveyances.

§ 41. At common law. By the English common law the fee of the married woman was, during her coverture, transferred by a fine or recovery. These were collusive suits. To them the husband was a party, and the wife was examined separately and apart from her husband to ascertain whether her act was voluntary. As these forms of conveyance have been entirely unknown in most parts of the United States, the question arises whether in the absence of statute any other mode existed for the conveyance of the married woman's fee. In New England a kind of custom grew up in the absence of statute by which the married woman's real estate was transferred by a simple deed in which her husband joined, and this practice had continued so long that the courts felt obliged to recognize it as a valid way of effecting conveyances (3). In other states, however, it has been held that in the absence of any statute authorizing the conveyance of a married woman's estate by a deed in which her husband joined, she could not transfer by this method, and as fines and recoveries were unknown, she practically was deprived of any power to transfer her real estate. So, where a married woman is under age, so that the statute in force gives her no power to transfer her real estate, her deed is absolutely void. So, where she conveys in a

(2) Veal v. Hart, 63 Ga. 728.

(3) Manchester v. Hough, 5 Mason 67 (U. S. Cir. Ct.).

manner not prescribed by the statute after she comes of age, she has exercised no power, and the deed is absolutely void.

§ 42. **In equity.** The power of a married woman to deal with the legal title to her property was not modified by courts of equity. The courts of equity, however, after the married woman had acquired a "separate estate" in the hands of a trustee, did give her power to alienate. The development of this doctrine and of the restraints on the alienation is described by Professor Dicey as follows:

"The Court of Chancery having thus created separate property for a married woman, by degrees worked out to its full result the idea that a trustee must deal with the property of a married woman in accordance with her directions. Thus the court gave her the power to give away or sell her private property, as also to leave it to whomsoever she wished by will, and further enabled her to charge it with her contracts. With regard to such property, in short, equity at last gave her, though in a roundabout way, nearly all the rights of a single woman. But equity lawyers came to perceive, somewhere towards the beginning of the nineteenth century, that though they had achieved all this, they had not given quite sufficient protection to the settled property of a married woman. Her very possession of the power to deal freely with her separate property might thwart the object for which that separate property had been created; for it might enable a husband to get her property into his hands. Who could guarantee that Barry Lyndon might not persuade

or compel his wife to make her separate property chargeable for his debts, or to sell it and give him the proceeds? This one weak point in the defenses which equity had thrown up against the attacks of the enemy was rendered unassailable by the astuteness, as it is said, of Lord Thurlow. He invented the provision, constantly since his time introduced into marriage settlements or wills, which is known as the restraint on anticipation. This clause, if it forms part of the document settling property upon a woman for her separate use, makes it impossible for her during coverture either to alienate the property or to charge it with her debts. Whilst she is married she cannot, in short, in any way anticipate her income, though in every other respect she may deal with the property as her own. She may, for example, bequeath or devise her property by will, since the bequest or devise will have no operation till marriage has come to an end. But this restraint, or fetter, operates only during coverture. It in no way touches the property rights either of a spinster or of a widow. The final result, then, of the judicial legislation carried through by the Court of Chancery was this: A married woman could possess separate property over which her husband had no control whatever. She could, if it were not subject to a restraint on anticipation, dispose of it with perfect freedom. If it was subject to such restraint, she was during coverture unable to exercise the full rights of an owner, but in compensation she was absolutely guarded against the possible exactions or persuasions of her husband, and received a kind of protection which the law of England does not

provide for any other person except a married woman'' (4).

§ 43. **Under the act of 1861.** This act gave no right whatever to the married woman to convey her real estate without the joinder of her husband as required by other and earlier statutes.

§ 44. **Under statutes dealing directly with the married woman's right to convey.** In practically all states at a very early date special acts were passed providing for the manner in which a married woman might convey her separate estate. From time to time these acts have been changed, so that the acquisition of expert knowledge in different states, with respect to the requirements for married women's deeds requires an intimate knowledge of the dates of different statutory changes. Thus, in examining an abstract of title during a period of sixty years, a married woman's deed at the beginning of the period will be governed by one statute, and at a little later period by another, and at still a later period by a third. The practical knowledge of the conveyancer consists in his knowing the dates of these different acts and the precise details of their provisions. In this article no attempt is made to do more than to indicate to the reader the character of the data necessary to be mastered.

It may be said in general that all acts in the beginning required the joinder of the husband with the wife and it is probable that the great majority required an examination of the wife separately and apart from her husband before a notary public or other officer authorized to make

(4) A. V. Dicey, Law and Opinion in England, pp. 375-377.

the examination, and then the taking of the married woman's acknowledgement setting forth the separate examination and showing that her execution of the instrument is her voluntary act. At a later time the separate examination was usually dropped. In some jurisdictions the necessity of any acknowledgement by the married woman has been dropped, and perhaps in a few it is not even necessary for the married woman to join with her husband, but she may make conveyances exactly as a man can.

When it is said that the married woman need not join with her husband it should be understood that she need not join with her husband in order to pass her title. Of course, practically everywhere the transferee demands the joinder of the husband in order that his dower or curtesy interest may be released or his right of homestead.

Section 3. Devises.

§ 45. At common law. It has been said that at common law a married woman might with the assent of her husband dispose of her chattels by will. When one remembers, however, that all the wife's chattels, whether acquired before or after marriage, passed by operation of law to her husband, this statement seems somewhat remarkable. If the courts recognize her will as a valid disposition of the chattels mentioned, it must have been because it was the will of the husband, and that his assent to it made it his will.

At common law there was no power in anyone to de-

vise real estate. That power was first given by the statute of wills of Henry VIII. By it no power was given to a married woman to devise her lands. The indirect result of this seems to have been that the will of an unmarried woman was ipso facto revoked by marriage.

§ 46. **In equity.** The power of a married woman to devise her separate property is thus described by Professor Dicey:

"Equity, whilst conferring upon a married woman the power to dispose of her separate property by will, gave her no testamentary capacity with respect to any property which was not in technical strictness separate property. Take the following case: W was possessed of separate property. By her will made in 1850, she left, without her husband's knowledge, the whole of her property of every description to T. In 1855 H, her husband died and bequeathed £10,000 to W. W died in1869, leaving her will unchanged. The property which had been her separate property in 1850 passed to T, but the £10,000 did not pass to T. It would not pass at common law—it would not pass according to the rules of equity—for the simple reason that as it came to W after her husband's death, it never was her separate property" (5).

§ 47. **Under the acts of 1845 and 1861.** By an act of 1845 in Illinois a married woman was given power to devise her "separate estate." When that act was passed the only separate estate which a married woman could have was the separate estate in equity, and this statute, there-

(5) A. V. Dicey, Law and Opinion in England, pp. 378-379.

fore, merely confirmed the rule enforced by courts of chancery. When, however, the act of 1861 appeared, very much enlarging the married woman's separate estate and making a legal separate estate, the married woman's right to devise was greatly enlarged, and it was held that under the act of 1861 a married woman had full power to devise anything that was her separate estate under that act. Furthermore, after the act of 1861 the marriage of an unmarried woman no longer revoked her will. The rule still obtained, however, that the married woman could not devise her after-acquired separate estate, but only the separate estate which she had *at the time the will was made* (6).

Section 4. Estoppel of Married Women.

§ 48. In the absence of legislation. In England it seems that the false representations of a married woman as to facts which if true would have given her power to transfer land, would operate in equity to preclude her from setting up the invalidity of her act. This has been followed in this country to some extent, but here the opposite doctrine it is believed prevails—that the married woman is not precluded by her false representations.

§ 49. Under married women's legislation. After acts like the Illinois act of 1861 the married woman was bound by her contract relating to her separate estate. Did this added power to contract change the rule so that she would be bound in case she made such false representations, as, if true, would have permitted her to contract?

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(6) Thompson v. Minnich, 227 Ill. 430.

Courts have reached a variety of conclusions in regard to this. It seems to have depended largely upon the temper of the court whether it thought that the legislature had gone so far in making a married woman sui juris that she should be treated as adult males are treated and compelled to stand by the results of her false representations.

§ 50. **Under the most advanced married women's acts.** Of course, the moment a married woman is practically made sui juris and put upon the plane with an adult male with respect to making contracts and conveyances, there is no doubt but that she will be compelled to stand by her false representations so as to become liable to the extent that she would have been if such representation had been true.

CHAPTER V.

TRANSACTIONS BETWEEN HUSBAND AND WIFE.

SECTION 1. CONTRACTS AND CONVEYANCES.

§ 51. **At common law.** At common law a contract between husband and wife was absolutely void as to the husband as well as the wife. The conveyance by the husband directly to his wife was equally void. Husbands desiring to convey to their wives, therefore, conveyed to third parties, who conveyed to the wives.

§ 52. **In equity.** Courts of equity enforced the repayment of loans by wives to husbands out of their separate property, against the estate of her husband. So, where the wife's separate property was mortgaged for the husband, the wife was allowed to prove against the husband's insolvent estate. A deed from the wife to her husband, of course, was never enforced in law or in equity, but a deed from the husband to the wife was enforced by a court of equity.

§ 53. **Under the act of 1861.** Under this act contracts between husband and wife were still void; also conveyances by the husband to the wife. The rules enforced by courts of equity remained the same.

§ 54. **Under the act of 1874.** Under this act husband and wife can convey freely to each other, and they can contract with each other.

Even under the most advanced legislation a question frequently arises with respect to the power of husband and wife to enter into partnership. Sometimes such partnership agreements are expressly forbidden between husband and wife. Where they are forbidden, either expressly or by reason of not being expressly permitted, it would seem that third parties dealing with the husband and wife as partners could at least hold them liable jointly on the ground that the obligation was a joint obligation and that each was capable of contracting with a third party.

§ 55. **Rights of creditors.** Creditors are often interested in the nature of the transaction between husband and wife. For instance, is the husband an agent of the wife at a salary; or has the wife loaned him money, so that she is entitled only to a claim for the money and interest? The facts may make it very obscure as between husband and wife which of these transactions exists in a given case. Whether one or the other exists may make a vast difference to the creditors of the husband. For instance, if the husband is only an agent on a salary and the business he is conducting is very profitable, the profits all go to the wife and the husband's creditors go unpaid. If, however, the transaction is a loan from the wife to the husband, all the profits of the business belong to the husband and his creditors may be satisfied. There is often a strong suspicion that the latter is the real substance of the transaction, and that the other is its colorable character for the purpose of avoiding creditors.

SECTION 2. SUITS BETWEEN HUSBAND AND WIFE.

§ 56. **At common law.** The husband and wife could not sue each other at common law, and hence the wife had no action against her husband for beating her.

§ 57. **In equity.** Where suits properly belonged in equity, there was no objection to the husband being a party to the wife's suit, or the wife a party to the husband's. As equity, however, did not undertake to give damages for personal injuries or for the breaches of contract, the wife had no remedy in equity for injuries inflicted upon her by her husband, or for breach of the husband's attempted contract with her.

§ 58. **Under the act of 1861.** So far as her separate property was concerned, the wife was under this act permitted to sue her husband, but the husband could not sue the wife for chattels which the husband claimed. In other words the cases are in considerable conflict as to whether an act like the act of 1861 would by indirection include a suit by the wife against her husband even with respect to her separate estate. As to whether an act like that of 1861 gave the wife the right to sue her husband for assault, judicial opinion seems to be divided (1). It is clear, however, that after an act like that of 1861, the husband may be guilty of larceny from his wife where he steals her separate property (2).

§ 59. **Under the act of 1874.** Under this act full

(1) See Shultz v. Schultz, 28 Hun. (N. Y.) 26.

(2) Beasley v. State, 138 Md. 552.

power is given to the husband and wife to sue each other with respect to property, but neither husband nor wife can sue each other for services. As to whether the husband or wife can sue the other for assault is not settled by the explicit language of the statute.

Section 3. Ante-Nuptial Liabilities to Each Other.

§ 60. **At common law.** Marriage extinguished the liability of the parties to each other. Thus, if a man made a note to a woman and married her, the obligation was extinguished.

§ 61. **In equity.** This rule apparently was not wholly observed in equity. There the obligations were enforced so long as the enforcement was not futile. Thus, the contract of a wife to settle property on her husband made before her marriage was enforceable against the wife after marriage. So, whatever promises of the husband to the wife made before marriage became a part of the wife's separate estate in equity, chancery would enforce against the husband after marriage. But a note by the husband to the wife made before marriage equity would not enforce after a marriage because, if it did so, whatever was collected would belong at once to the husband.

§ 62. **Under the act of 1861.** Under this act the wife could sue the husband on a note given her before marriage, because after the marriage it remained part of her separate estate.

Section 4. Right of Husband to Chastise Wife or Deprive Her of Liberty.

§ 63. At common law. Whatever right the common law originally recognized in the husband to chastise the wife and to deprive her of liberty, became obsolete in the nineteenth century. Thus in a recent English case (3) it was held that the husband had no right to restrain the liberty and action of the wife. In that case the husband had obtained a decree for the restitution of his conjugal rights. His wife refused to obey this decree, whereupon the husband, assisted by two men, seized the wife, forcibly separated her from her sister, dragged her into a carriage, and drove her to the husband's house in which she was detained. It was held that a writ of habeas corpus could be maintained to release the wife from the custody of the husband.

Section 5. Husband and Wife as Witnesses.

§ 64. At common law and under recent statutes. At common law husband and wife were under an absolute disqualification to testify *for* each other. Each, however, had a privilege not to have the other testify against the spouse. This distinction between a disqualification and a privilege was important when the wife sought to testify on behalf of the spouse's estate after his death. There, the disqualification ceasing, the wife was competent. These simple results have not always been observed clearly by the courts and confusion between the disqualifications and the privilege has been made.

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(3) Regina v. Jackson, L. R. [1891] 1 Q. B. 671.

The above remarks apply where the husband was a party to the suit. Now suppose the husband is not a party, but is disqualified because he is interested in the outcome of the suit. It is clear that the wife was also disqualified. It must be apparent, however, that the wife was disqualified because the interest of her husband extended to herself. When, therefore, a statute was passed as was done in practically all jurisdictions about the 1860's or 1870's, abolishing the disqualification of interest generally, so that the husband became a competent witness, why was not the wife also a competent witness, just as the wife was competent where the husband was a witness and not interested in the suit at all? It would seem that this question should be answered in the affirmative. At least one respectable court, however, seems to have had difficulty with it—deciding the point both ways (4).

At the present day there are in practically all jurisdictions special statutes purporting to cover the whole subject of husband and wife as witnesses. These statutes are drafted along the lines of allowing husbands and wives to testify for or against each other in particular classes of cases; for instance, where the cause of action grows out of a personal wrong or injury done by one spouse to the other, or out of the negligence of the husband to furnish the wife with suitable support, or where the litigation is concerning the separate property of the wife, and in suits for divorce. A proviso may be ex-

(4) Gravel Road Co. v. Madaus, 102 Ill. 417; Craig v. Miller, 133 Ill. 300.

pected that in no case is the husband or wife permitted to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third parties, except in suits between husbands and wives (5).

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(5) See Illinois, R. S. 1874, ch. 53, sec. 5.

CHAPTER VI.

LIABILITIES OF HUSBAND ON ACCOUNT OF WIFE.

Section 1. Ante-Nuptial Contracts and Torts of Wife.

§ 65. At common law. Marriage was not all clear gain for the husband. If he obtained all of his wife's personal property absolutely, all of her real estate during his life, and her earnings, he was, nevertheless, liable for her ante-nuptial torts and contracts. Thus damages might be recovered against him for the slander of a third person by his wife before her marriage. The husband, however, was only liable during coverture, and upon the husband's death the wife again became solely liable.

§ 66. Under the later acts. The act of 1861 it was held did not change the rule of the common law in respect to the husband's liabilities for the ante-nuptial contracts and torts of his wife. In 1869 in Illinois a further act was passed giving to the wife her earnings. This was held by implication to repeal the husband's liability for the wife's ante-nuptial torts and contracts. The acts, having abstracted about all of the husband's profits from marriage, relieved him of its responsibilities. The later act of 1874 put the whole matter beyond doubt.

Section 2. Support of the Wife.

§ 67. Where the husband abandons and refuses support to the wife. In the absence of statute the husband who abandons and refuses to support his wife is not liable to the wife in any direct proceedings by the wife for alimony, according to the views announced by the courts in many jurisdictions. A few, however, have insisted upon the husand's liability in such a direct proceeding without the aid of statute. The result is that the statutes allowing a bill for separate maintenance without divorce are frequent. It is believed to be the law everywhere, however, that when the husband has abandoned his wife without her fault, she can pledge his credit for necessaries. But it is necessary in order to invoke this rule that the wife be not living apart through her fault, and it seems that the above rule does not apply where the husband and wife are living apart by mutual consent.

What are necessaries raises very much the same question as is considered where infants' contracts for necessaries are under discussion. An infant's contract is for necessaries even though he has a sufficient property to enable him to pay cash, so that he is not really under any necessity of pledging his credit (1). Curiously enough, where the question is as to the wife's necessaries, one case at least seems to hold that where the wife has a sufficient settlement from her husband, he cannot be charged for her necessaries (2). Would the result be the

(1) See § 109, below.

(2) Hunt v. Hayes, 64 Vt. 89.

same if the settlement upon the wife came from any other source?

§ 68. **Where the husband has not abandoned or failed to support the wife.** Under these circumstances the husband it seems is liable only so far as his wife had authority as his agent to pledge his credit. Of course, if the wife has explicitly expressed authority, the case is simple. The difficult case arises where an authority in the wife is attempted to be made out by circumstantial evidence. Thus, without any express authority, the wife in fact is accustomed to clothe, feed, and house the family to a greater or less extent. According to the scope of her ordinary duties, looked at from the point of view of the station in life of the family, her authority expressed by the circumstances will be determined, and may indeed be very wide.

It seems also that the husband may be charged by reason of a rule of liability which does not rest upon any actual agency at all. Thus, where the husband gives to the wife a general authority, the wife operates under it, and the plaintiff gives credit; if suddenly and secretly the husband revokes the wife's authority, but takes no steps to give notice to the tradesmen, and the tradesmen thereafter extend credit as formerly, the husband is liable. It is foreign to our purpose here to discuss whether this is due to the application of the law of estoppel or the law of agency. It is sufficient that the rule is well established (3).

§ 69. **Recent legislation.** Statutes in many states

(3) Anthony v. Phillips, 17 R. I. 188.

make a husband liable for necessaries furnished the wife suitable to her station in life whenever he neglects to furnish them. Another form of statute makes the husband and wife both liable individually or jointly for what are known as "family expenses." The problem here is to ascertain how far the statute really goes. In terms it is very broad. But suppose the husband has dissipated his wife's property through the medium of contracting debts for family expenses—horses, carriages, clothes, and high living. What can the wife do? The statute does not seem to permit the giving of general notice to tradesmen and others accustomed to giving credit. It has been suggested, though no adjudicated case is known supporting it, that the only recourse which the wife has is to leave her husband and thereby disrupt the "family" so that there can be no such thing as a "family expense." It seems a little hard that the statute should force any such action as this.

Section 3. Post-Nuptial Torts of the Wife.

§ 70. **At common law.** The husband was liable at common law for the post-nuptial torts of his wife even if they were living apart, but the husband and wife must both be joined in the suit. A wife acting in the presence of her husband was prima facie not a joint tort feasor with the husband, and prima facie not liable with the husband.

The problem of the liability of a married woman for her post-nuptial torts which were connected with contracts, should, it is believed, be solved upon the same

lines as have been worked out by the courts in respect to the infants' contracts connected with torts (4). There is this difference, however, that while the infant's contract had in most cases a validity until disaffirmed, the married woman's contract was regarded as an absolute nullity which could not be given life. For that reason it might be urged that a more extreme doctrine should be applied in giving immunity to the married woman for her torts connected with contracts. In one case where the married woman's false representations induced the making of a contract with her, the court was evenly divided as to whether she would be liable for the tort or not. In such case it is clear that the infant would have been liable for his tort (5).

§ 71. **Under later legislation.** Under the act of 1861 the law, as stated in the previous paragraph, remained unchanged. The husband was still liable for the married woman's post-nuptial torts. After the act of 1869, however, giving to the married woman her earnings, the husband was relieved from liability for the wife's post-nuptial torts. The act of 1874 placed the matter beyond doubt.

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(4) See §§ 133, 134, below.

(5) Wright v. Leonard, 11 C. B. (N. S.) 258.

CHAPTER VII.

MARITAL RIGHTS AGAINST THIRD PARTIES.

§ 72. **Tortious damage to wife or to husband's right in the wife.** When a wife was damaged by the negligence of a third party two causes of action arose. First, that for the pain, suffering, and inconvenience to herself resulting from the injury; secondly, that accruing to the husband, who, since he had a right to his wife's earnings, had a legal right in the wife which was interfered with by reason of the tortious damage to the wife. In the husband's action alone recovery was had for the loss of services and earnings. Obviously the recovery in one of these suits did not bar a recovery in the other.

Recent legislation has not entirely disposed of this state of the law. The husband is still entitled to his separate action for damage to his right in the wife. Since, however, he is no longer entitled to her earnings, but only to her services and assistance, he can recover damages only to the extent of the loss of her services and assistance. On the other hand, the married woman who can now usually sue for the damage to herself in her own name, can recover not only for pain and suffering, but also for actual loss of earnings where she is engaged in an occupation which yields her an income.

§ 73. **Criminal conversation.** The husband has an ac-

tion against one who commits adultery with or rape upon his wife although there is no proof of actual loss of service. This action is based upon a tort arising solely from sexual intercourse. At common law the wife had no action against a woman with whom her husband had sexual intercourse, but under some modern statutes she has such an action.

§ 74. **Alienation of affections of spouse.** It is clear that the husband has an action against a third party who seduces his wife. The action for alienation of the affections of the spouse goes much farther, however, and gives the husband an action against anyone who entices his wife to live away from him whereby the husband is deprived of the comfort and society of his wife and her aid and assistance in his domestic affairs. How far will a good motive on the part of the third person in advising the wife to live apart from her husband be a good defense? Suppose for instance that a parent induces his daughter to leave her husband because of evil habits. A leading New York case has allowed such a defense (1). Cases where friends from the best of motives advise a wife to leave her husband have been decided both ways. Some hold the defendant liable. On the other hand, it has been held that he is not liable. The reasoning upon which the latter result is supported is this: At present married women under the law are individual responsible human beings. What they may do by way of leaving their husbands they are responsible for. Third persons advising

(1) Bennett v. Smith, 21 Barb. (N. Y.) 439.

with them are not to be held liable for the actions of the wife so long as they are guilty of no improper motives and no false representations can be brought home to them. Where the advice is fair and honest, the courts may well refuse to consider them as the cause for the wife's act. The contrary view seems to rest upon the older notion that the married woman is not sui juris and therefore any advice, however honest, which she took must be the responsible cause for her action. Therefore the person giving it must be liable. It is submitted that under modern legislation, relieving married women from practically all their disabilities, and with the new movement for woman suffrage gaining great proportions, the latter reasoning is old-fashioned and absurd.

Some jurisdictions, and this represents also the common law rule of the English cases, do not permit the wife to sue another woman for the alienation of her husband's affections, but this doctrine has been disapproved in many jurisdictions in the United States, and the wife is given the same right to sue the woman for the alienation of the husband's affections as the husband is. It should be observed, however, that this does not necessarily include the right of a wife to sue a woman with whom her husband may have had sexual intercourse without particular proof that the husband was induced by her to leave and neglect his wife.

PART III.

PARENT AND CHILD.

CHAPTER VIII.

THE CUSTODY, CONTROL AND DISCIPLINE OF THE CHILD.

§ 75. **Right to custody of child at common law.** The English courts, administering what was there known as "law," as distinguished from the rules enforced by the courts of chancery, recognized the right of the father to the custody of his minor children as superior to that of any one else, even the mother. In 1836 the right of the father to the child's custody was recognized as against that of the mother, although the father had formed an illicit connection with another woman, though not in such a way as to bring his children into contact with his own immorality (1). The parties in this case were socially prominent and the decision caused such a scandal that what was known as Sergeant Talfourd's act was passed by Parliament, which provided among other things that the court might, if it saw fit, on the petition of the mother of an infant in the custody of its father, make an order for the delivery of such infant to the mother, to remain in her care and custody until such infant attained the age of twelve years.

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(1) Rex v. Greenhill, 6 N. & M. 244.

§ 76. **In equity.** The English court of chancery acted quite differently with respect to the child's custody. It undertook to make such provision as should be for the best interest of the child under all the circumstances. In doing this it did not hesitate to take him from a father who was unfit. The interposition of a court of chancery, however, was not apt to be invoked unless the child had property in charge of the court, so that the rule which the court administered was in reality a rule for rich children while the rule enforced by the courts of law remained still the rule for the masses.

§ 77. **In American courts: Father's right of custody as against the mother's.** In this country questions of the custody of children are usually settled in habeas corpus proceedings brought by one who desires to obtain the custody against the person having it at the time. In this form of proceeding our courts have been accustomed to exercise the discretion which the English courts of chancery exercised and to ignore the father's and even the mother's strict right of custody whenever it seemed advisable for the interests of the child. In a recent New York case (2) the court found that the husband and wife were both equally proper persons to have the custody of the child and that neither the husband nor the wife more than the other was in fault in not living together. The court, however, at first awarded the custody of the child to the mother because of its tender years. When, however, the child reached the age of five years the circumstances

(2) People v. Sinclair, 86 N. Y. Supp. 539.

remaining the same except for the child's age, the court awarded its custody to the husband on the ground of his legal right to its custody as against the mother, and the fact that he had done nothing to forfeit that legal right (3).

§ 78. **As between the parent and strangers.** Of course, a parent's right to the custody of the child as against strangers is paramount. The case which causes difficulty is this: A child has been taken from the mother, let us say with her consent for the time being, and brought up in the wealthy family of the deceased father, the mother continuing in humble circumstances. When the child has reached twelve or fourteen years of age the mother demands possession of it from the husband's wealthy relatives. If the court inclines to recognize the parent's right as paramount, it will say that the child's more selfish interests must yield to some extent to the right of the mother, and the child must be taken from the lap of luxury and go to work for his more humble parent. On the other hand, if the child's more selfish interests are to control, the parent's right must give way. Respectable courts have differed in their attitude toward the question of policy involved—some insisting upon the parent's "right" as against the more selfish interests of the child, and others insisting upon the more selfish interests of the child as against the parent's right.

§ 79. **Agreements as to the custody of children.** The parent's agreement as to the custody of the child cannot

(3) People v. Sinclair, 95 N. Y. Supp. 861.

prevail against the best interests of the child. Hence, whenever it is for the best interests of the child that it be restored to its parent, the agreement will not prevent such a step being taken. The agreement can never be effective to transfer to another the superior right of a parent, so that all things being equal, the stranger will have a right to the custody of the child as a parental right, even to some extent against the child's more selfish interests. As to whether the agreement, though not strictly a contract, can operate as a waiver of the parent's right of custody so as to permit the continuation of the actual custody of the child in a third party, to be decided wholly with reference to the more selfish interests of the child, the cases are conflicting. A considerable number of jurisdictions take the view that the agreement can so operate—others that it cannot.

§ 80. **The juvenile court acts.** These acts providing for the handling of cases of juvenile offenders have become widely known through the publicity given to the work of the juvenile court in Chicago and in Denver. These acts divide juvenile offenders into dependents and delinquents. The delinquents are those who have committed misdemeanors, or even some serious offenses. The dependents are those who suffer from neglect and lack of proper care. The act provides for a court entirely separate from the criminal courts for the taking up of both of these classes of cases. The court is assisted by probation officers who of their own motion bring cases before the court and who look after children whom the court paroles or places on probation. These juvenile court acts

give the court a large power to take children from the custody and control of their parents whenever the parents are in default with respect to the care or control of their children, or where the child is a delinquent and where in the judgment of the court the child would be better off in some school designed to care for dependent or delinquent children. The proceedings of the court are summary and without any trial by jury. The result is that two constitutional questions have been raised with reference to these acts. The first is that the parent's legal right of custody was interfered with without making him a party to the proceeding and allowing him the chance to be heard and his rights adjudicated. Secondly, that the constitutional right of trial by jury was denied. The answers to these two objections are not very difficult. The legislature has full power to alter and modify, if not abolish, the parent's legal right to the custody of the child. Furthermore, the jurisdiction given to the juvenile court over children is in reality only the original chancery jurisdiction of the English courts. The judgment, therefore, which takes the child from the custody of its parent and commits it to some school or institution for the care of children is not a criminal proceeding in which a jury trial may be demanded as of right, but only a chancery proceeding which disposes of the custody of the child for the best interests of the child.

§ 81. **Parent's right to administer corporal punishment to the child.** As we shall hereafter see, the parent is not liable for torts to the child. Hence, the fact that when a parent chastises the child the parent cannot be

sued, does not necessarily prove the parent's right to chastise the child, but only that the parent is immune from suit. When, however, the punishment of a child is delegated to another who administers moderate corporal chastisement and that person can be sued for trespass by the child, it may fairly be said that the chastisement is the exercise of a "right" belonging to the parent. It seems that persons who stand in loco parentis have the same right moderately to chastise the child as the parent would have. In fact there is one case on record where a mother left her child with a person who was to support, educate, care for and treat it as his own child, but it was specifically enjoined by the mother that the child was not to be whipped. Nevertheless, upon the child's being moderately whipped it could maintain no action for assault against the person in whose custody it had been left (4).

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(4) Rowe v. Rugg, 117 Ia. 606.

CHAPTER IX.

VARIOUS PARENTAL RIGHTS AND OBLIGATIONS.

SECTION 1. OBLIGATION OF PARENT TO SUPPORT CHILD.

§ 82. **The English view.** The English courts expounding the common law have denied any *legal* obligation on the part of the parent to support his minor child. Thus, the parent is not liable for dire necessities furnished the minor child in the absence of any express authority on the part of the parent to the child to pledge the parent's credit. When therefore the child has been away from home with the parent's consent and has fallen ill and been cared for by a stranger, the stranger has had no recourse against the parent because the parent gave the child no express authority to pledge his credit.

Of course, such authority from the parent to the child may often be found not only in the express words of the parent, but from circumstantial evidence, or by inference from such power to pledge the parent's credit as the parent recognizes. But if the actual agency is not made out the claim against the parent must fail.

Even where the child was living away from the father by reason of the father's fault the parent was apparently only charged for the necessaries furnished the child when the child was in charge of the wife, and then only on the

theory that the wife, who was living apart from the husband by his fault, was entitled to charge him for her necessaries and that the necessaries for the child were part of the wife's necessaries.

§ 83. **More liberal American views.** In this country the courts have not hesitated to hold that when the child is forced to live away from the father by reason of the latter's fault, the parent is liable as a matter of law for the child's necessaries furnished by a third party. Thus, where the wife obtains a divorce from the husband by reason of his fault in deserting and failing to support herself and child, he is liable to a third party who furnishes support for the child.

Many jurisdictions have gone the whole length of recognizing a complete legal obligation on the part of the parent to support his minor child. Thus, even after a divorce obtained by the wife, who was given the custody of the child against the father's objections and where no provision was made for its support, the late wife has been held entitled to recover from the father for the support furnished the child. But many jurisdictions refuse to go so far and hold that where the husband has been deprived of the custody of the child by a divorce decree, he cannot be held for the support furnished the child other than that provided for specifically in the divorce decree.

Finally, cases are to be found in this country which, except in the case of the husband's desertion of his child or refusal to support it or unfitness to have the custody of it, refuse to recognize any legal obligation on the part of the parent to support the child. Thus, where the wife se-

cured a divorce before the child was born and no order at all was made concerning the child's custody, but the wife kept the child after it was born and the father lived near and never made any effort to obtain the custody of it, the father was not liable to the mother for necessaries furnished the child (1).

In no jurisdiction it seems is the parent liable for the child's support or for necessaries furnished the child where the child has been taken from him unlawfully by the wife or any other person, or where the child has gone or remained away against the father's will.

In one jurisdiction which goes farthest in holding the parent to a legal obligation to support his minor child, a direct proceeding in which the child sues the parent for an allowance for support has been denied the child (2). It is by no means clear, however, that the difficulty here is not merely procedural and that in other jurisdictions where codes are in force which allow every legal right to be enforced without any difficulty of procedure, the child may not be allowed to sue the parent directly for an allowance for support.

§ 84. **Statutory provisions.** Statutory provisions requiring members of families to support relatives who are unable to support themselves are common. They require the child to support the parent as well as the parent to support the child.

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(1) Ramsey v. Ramsey, 121 Ind. 215.
(2) Huke v. Huke, 44 Mo. App. 302.

SECTION 2. PARENT'S RIGHT TO EARNINGS OF CHILD.

§ 85. **The parent is entitled to the earnings of the child.** The minor child's lack of right to his earnings and services is very neatly brought out in the case where the child sues for personal injuries occurring through the defendant's negligence and the jury are instructed to find such damages as will compensate the minor for the time he loses from his work. Unless it is also proved that the infant has been emancipated this is a fatal error, and judgment for the plaintiff must be reversed because the plaintiff is not entitled to his earnings during his minority and so can recover no damages for the loss of the same. The father is the one entitled to the child's earnings. He can require the child's employer to pay to him directly the child's earnings, and property purchased by the child with the child's earnings is the property of the parent, and if the child takes title in his own name he can be held as trustee of it for his parent.

It seems also that the mother, in some jurisdictions, succeeds to this right of the father to the child's earnings in case of the father's death or desertion.

§ 86. **Assignability of the right to the child's services.** The right of the parent to assign by parol to a third party the child's future wages has been recognized. The assignment, however, of the custody and services of the child to a third party has been held to be revocable by the parent, unless it be under seal. Under statutes relating to apprentices, the attempted assignment by parents of the custody and services of the child, while bind-

ing between the parent and the third party, is revocable by the child unless the terms of the statute have been complied with.

§ 87. **Emancipation.** Emancipation is the release by the parent of his right to the child's services and earnings. By it the child becomes entitled to his own services and earnings. The emancipation may be either complete or partial. No particular formality is required for an emancipation. An expressed intent to emancipate by the parent, accepted by being acted upon by the child, is sufficient.

Emancipation may also occur by reason of the conduct of the parent toward the child. Thus, where the parent sends the child from home, his act operates as an emancipation for the time being at least.

So, if the parent deserts the child or refuses to support it there is an emancipation. The marriage of the child it is generally held operates as an emancipation, even when the marriage is against the parent's consent, though the contrary has also been held.

SECTION 3. ACTION FOR INJURY TO PARENTAL RIGHTS.

§ 88. **Loss of child's services due to the torts of a third party.** It follows from the fact that the parent is entitled to the child's earnings and services that he has a valuable right in the child to the extent of its services and earnings, and he may recover for any tortious act to the child which results in damage to that right. It happens regularly, therefore, when a child is hurt, that two causes of action may arise—one to the child and the other to the

parent. The two actions are entirely distinct. A recovery for one does not bar the other. The rule of damages in each is different. The child recovers for pain, suffering, and damages occurring by reason of the loss of earning power after he is twenty-one. The parent recovers for the loss of earnings and services occurring prior to the time the suit is brought and in the same suit he may recover for prospective earnings and services up to the time the child reaches twenty-one.

§ 89. **Where there is no actual loss of services when suit is brought.** It is plain that the parent's right of action rests upon the interference with his right to the child's earnings and services. Hence, if there is no loss of services or earnings, present or future, no cause of action arises. Thus, where the child was expelled from school improperly the parent has no cause of action (3).

Suppose that the child is too young to perform any services or to produce any earnings and the only damages shown are the expenses for the care and nursing and doctor's bills. It is now generally held in this country that these can be recovered by the parent, though upon what logical ground is not quite clear (4). The English courts do not admit this.

Suppose the child has been damaged and an actual loss of services has occurred, or at least money has been paid to secure the child's cure, so that the cause of action in this country has arisen in favor of the parent, and then the child dies as a result of its hurt. The extraordinary

(3) Sorrels v. Matthews, 129 Ga. 319.

(4) Trow v. Thomas, 41 Atl. (Vt.) 652.

doctrine prevails in this country and in England that no recovery can be had for any prospective loss of services or earnings from the time the child dies until he would have reached twenty-one. If the cause of action arises and the child be alive at the date of the trial, prospective damages can be had for the loss of services up to the time he would reach twenty-one. If he dies after judgment that does not affect the judgment, but if he dies before trial no damages can be recovered other than those actually suffered before his death (5). This seems a bit of bad logic that needs explanation from those who venture to support it. The courts in adopting this rule have, it is believed, unduly confused the situation presented with that which occurs when the child or adult has been killed and the deceased's personal representative or next of kin sues for damages accruing by reason of the death. In such cases it was held that no recovery could be had. The tort to the individual did not survive for the benefit of his estate and there was no tort to the next of kin because they had no legal interest in his life. But the parent has a legal interest in the earnings and services of his minor child. Causing the child's death is just as complete an interference with that right as is the infliction of personal injuries upon the child who lives, and prospective damages should be recovered just as much in one case as in the other.

§ 90. **Seduction of the plaintiff's daughter: During daughter's minority.** The action for seduction of the

(5) See note 4.

plaintiff's daughter has a popular and a technical aspect. Popularly it is an action for damages to vindicate the outraged feelings of the parent. Hence, if any damages at all may be recovered, they may be allowed for the wounded feelings of the parent. Technically, however, the plaintiff's cause of action must depend upon his right to sue for the loss of the child's earnings or services occasioned by the seduction and the consequent pregnancy or other physical damage to the child. The principal difficulty with maintaining any suit at all arises of course where the child renders no services and produces no earnings. This situation usually occurs where the child is seduced while living away from home. If, however, the child is a minor when seduced, her earnings until she is twenty-one belong to her parents and if the result of the seduction is to interfere with or impair the child's earning power during that time, the cause of action arises. Thus, if the child is seduced while away from home but is confined at home, the parent's legal right to the child's earnings and services has been interfered with by the defendant's act of seduction. The American cases universally, and it is submitted, correctly permit recovery in such cases (6). The English courts through some incomprehensible lapse of logic or sympathy deny it (7).

If, however, the minor child is seduced and confined while away from home and while another is entitled to her services and earnings, the parent has suffered no loss

(6) Martin v. Payne, 9 Johns (N. Y.) 387.

(7) Dean v. Peel, 5 East. 45; Blonnuire v. Haley, 4 Jur. 107.

of services or earnings and so has no action (8). A few jurisdictions, which allow an action by the parent even in such a case, in reality abandon the action for loss of services and give to the parent an action for seduction as such.

§ 91. **Same: After daughter is of age.** Here the problem is different. The parent has no legal right to the child's services continuously, but only as the child may in fact render services to him. Hence, to maintain an action for the seduction of the plaintiff's daughter when the child is of age, the child must at the time of the seduction be the de facto servant of her parent. It is true that the services rendered may be of the slightest character—as making plaintiff's tea, or darning his stockings—but the de facto relation of master and servant must exist. Thus, where the daughter is seduced while away from home as the servant of another, the parent has no action, though the daughter's confinement is thrown upon his hands. The same is true if the daughter is seduced even while she is at home if she is at home merely on a visit from her employer (9).

§ 92. **Rights of the mother.** Whenever there is a de facto relationship of master and servant existing between the mother and the child, although it arise only out of the presence of the child in the mother's household doing trivial services, the mother it seems must have such a right in the child as will support an action for damages thereto. In the same way, the person who stands in loco

(8) Dain v. Wycoff, 7 N. Y. 191.

(9) Thompson v. Ross, 5 Hurl. & N. 16.

parentis to the child has in some jurisdictions the benefit of a somewhat fictitious relationship of master and servant, so that the person in loco parentis can sue for damage to the child resulting from loss of service (10). By one respectable court, however, this has been denied (11).

Whenever the legal right of the father has been transferred to the mother, the mother it seems has the same right to sue for damages occurring by the act of a third party to the child, resulting in the impairment of the child's ability to serve or produce earnings, that the father would have had.

Whether, however, the mother actually succeeds to the legal right of the father to the child's earnings or services during the child's minority, upon the father's death or desertion, is a matter upon which the courts take diverse views. It is most frequently said that the mother does succeed to the father's full legal rights. Where this view prevails, suppose the mother secures a divorce from the father and is awarded the custody of the child. Does the mother then succeed to the father's right to the services and earnings of the child, so as to be able to sue for damages to the child causing a loss of such services and earnings? One court has recently said no. The fact that the father was deprived of the custody of the child did not deprive the father of his rights to the child's earnings and services (12)

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(10) Whitaker v. Warren, 60 N. H. 20.

(11) Kelly v. I. C. Ry., 100 S. W. (Ky.) 239.

(12) Keller v. St. Louis, 152 Mo. 596.

SECTION 4. TORT LIABILITIES.

§ 93. Liability of parent in tort to the child and vice versa. Of course, for assault upon the child the parent may be liable criminally, but the parent's immunity from suit by the child for injuries inflicted or excessive force used upon the child, seems to be complete. The most striking illustration of this immunity is to be found in a recent shocking case in the state of Washington (13). The father had been sent to the penitentiary for the crime of rape upon his minor child, but the child was not permitted to sue the parent for the tort. The rule works the other way also, a parent cannot sue his child for slander (14). These results rest on the public policy of discouraging the settling of family differences in the courts, and of preserving family discipline. As shown heretofore, the same rule applies as between husband and wife. Neither can sue the other in tort for acts occurring during marriage (§§ 56-59, above).

The immunity of the parent from suit by the child presupposes that the child has not been fully emancipated. Where the child had been emancipated and was working for the parent in his mill as his employee and was damaged by his parent's negligence, the child was allowed to sue and recover (15).

§ 94. Liability of parent to third persons for the tort of the child. The parent is under no liability to third persons for the tort of the child. In one case it was at-

(13) Roller v. Roller, 79 Pac. 788 (Wash.).

(14) Pattison v. Gulf Bag Co., 116 La. 916.

(15) Taubert v. Taubert, 103 Minn. 247.

tempted to hold the parent for the tort of the child on the theory that the child was, like a vicious animal, apt to be destructive, and that the parent was aware of the fault, or, as the phrase goes, had a scienter, and therefore was just as much liable for the destruction by the child of his neighbor's property as he would have been for the act of his vicious dog. This analogy, while interesting, was not permitted to charge the parent, who cannot cease to keep his child at will as he can his dog.

The parent, however, may be liable as a joint tort-feasor with the child. Thus, where the parent encourages in any way the act of the child so as to become a party to it, he may be liable jointly with the child. So, the parent may be liable because of his negligence in allowing the child to handle a dangerous instrument, provided the damage to the third person may be regarded as the proximate result of the act of the parent. These are usually cases where the parent allows the child to handle fire-arms. So, where the child is in fact a servant of the parent, acting within the scope of his authority, his acts are chargeable to the parent, and the parent may be liable in tort for them.

Section 5. Various Inferences of Fact Arising from Transactions Between Parent and Child.

§ 95. Parent's support of child prima facie deemed gratuitous. The parent actually furnishing the child with necessary support and maintenance is denied any right to charge the child with necessaries so furnished. It is immaterial whether the child is a minor and emanci-

pated, or an adult. It is usually given as a reason for this that the parent is under a legal duty to support the child. But this is not the case, for the same holding occurs where the child is a step-child or where the adult furnishing necessaries has assumed a position in loco parentis toward the child. Certainly there is no legal duty on the part of the adult to furnish support to the child under these circumstances. The truth is that the result in these cases arises not from any legal duty on the part of the parent or step-parent or the person in loco parentis to furnish the child with necessary support and maintenance, but because the actual relation between the parties is such as to raise the inference of fact that the maintenance and support given are gratuitous. Of course if the child is an adult the express promise on the part of a child to pay for board furnished by the parent is enforceable.

§ 96. **Child's support of parent prima facie gratuitous.** On precisely the same reasoning that the support of the child by a parent is deemed gratuitous, the support of the parent by the child is also deemed gratuitous in the absence of proof to the contrary.

§ 96a. **Inference of gift to the child.** Where property is paid for by an adult or a conveyance is taken in the name of an adult third party, the inference regularly indulged in is that the person in whose name the title is taken holds the title for the adult who paid the consideration, and the adult who paid the consideration is said to have a resulting trust which he can enforce against the person holding the title, and recover the title from him. Where, however, the property is paid for by a parent and

a conveyance is taken in the name of the child, there is the prima facie inference of a gift to the child, and no trust results to the parent who pays the consideration unless special facts are shown indicating that such a trust was intended.

§ 97. **Services rendered by adult or emancipated child to the parent and vice versa.** In the absence of an express contract to the contrary, these are deemed gratuitous. The same holding occurs where one party stands in loco parentis to the other. The cases dealing with this topic are usually very hard ones. A daughter may for many years remain at home unmarried to care for her aged parents, usually under some expectation of receiving the bulk of their property at their death. They forget to make any will in her favor. The result is that she shares equally with all the other children, and is accordingly disappointed. She then attempts to put in a claim against the estate for her services and is met with the proposition that the inference is that her services were rendered gratuitously. She is unable to make out any express contract, and therefore has her trouble for nothing.

CHAPTER X.

ILLEGITIMACY, ADOPTION, AND GUARDIANSHIP.

§ 97a. **Illegitimacy at common law and under modern statutes.** At common law the illegitimate child was the child of no one (filius nullius). He could inherit from nobody and none but his legitimate issue could inherit from him. This was not cured by general statutes of descent and distribution, for these were, by the construction placed upon them, held to apply only to legitimates. Hence, the existence of special statutes, now general, which specifically regulate descent to and from illegitimates and for the most part allow them to inherit from the mother and the mother to inherit from them in case of the death of the illegitimate without issue. The bastard's father is liable for its support only by statute and that liability can be enforced only in the manner provided by statute.

At common law the bastard was not made legitimate by the subsequent marriage of his parents. This is now generally changed by statute.

From the legal recognition of the relation of parent and child between the mother and her illegitimate child, which the statute regulating descent to and from bastards makes, it seems to have followed that the mother has a legal right to the custody of the child. It still remains

to be decided whether the mother is under the same duty to support her illegitimate child that the father would be to support his legitimate child, or whether the mother's right to the earnings and services of her minor illegitimate child, until it reaches its majority, is the same as that of a father with respect to the services and earnings of his legitimate child.

The bastard still labors under a disadvantage by reason of the fact that in the construction of statutes "children" means primarily legitimates. Thus, in statutes giving an action for causing death to the deceased's administrator for the benefit of the deceased's "children", children does not in some jurisdictions include an illegitimate child. In Texas, however, it has been held to do so (1). So, in a will or settlement the word "children", "son" or "issue" is construed primarily as referring to legitimate children or issue.

The actual blood relationship between the bastard and its mother and father's kin is so far recognized as to make the marriage of a bastard with her uncle by blood incestuous.

§ 98. **Mode of adopting children.** There can be no adoption except as authorized by the legislature, and the proceeding prescribed by the legislature for adoption must be strictly and accurately followed. Many hard cases and many disappointed hopes have arisen because of the failure of some lawyer entrusted with adoption proceedings to carry them out strictly in accordance with

(1) Galveston, etc. Ry. Co. v. Walker, 106 S. W. 705 (Tex.).

the statutes, so that the adoption has been illegal. But to follow the statute strictly is not the only caution to the lawyer conducting adoption proceedings. The constitutionality of the statute itself must be carefully scrutinized. A respectable court in a recent case decided that the adoption carried on strictly in accordance with the statute was invalid as against the child's parent, because that parent had not been served with process in the adoption proceedings or been made a party thereto, and the result of the decision suggests that an act providing for adoption without also providing in some way for the making of the child's parents parties and serving those parents with a summons or publishing a notice against the parents will be ineffective to deprive the parents of their right to the custody of the child. The cautious practitioner may also fear that an adoption under such a statute will be ineffective to enable the adopted child to inherit or be the heir of the adopting parents.

§ 98a. **Status of adopted child.** The adoption statutes universally provide that the adopted child is entitled to inherit from its adopting parents as would a natural child. Suppose then that the adopted child inherits from one of its adopting parents and then dies. The question at once arises whether descent from the adopted child as to the property which he has received from one of the adopting parents shall be to the surviving adopting parent or to the heirs by blood of the adopted child. This difficulty is sometimes settled by the adoption statute itself in favor of the adopting parent, or in favor of the heirs of the adopting parent from whom the property descended. It has been held, however, that even when no provision is

made by the actual words of the statute, yet the descent will be to the surviving adopting parent and not to the heirs by blood of the adopted child.

The adoption acts usually contain a blanket provision to the effect that the child adopted shall be deemed the lawful child of the adopting parents as if it were born in lawful wedlock. There is a considerable variety of opinion as to how far this provision will carry. It is held that the adoption of a child is so far equal to the birth of a child as to constitute the revocation of a will, by virtue of the common law rule that the will is revoked by the marriage of the testator or the birth of a child, or by reason of a statutory rule that the will is revoked by the subsequent birth of a legitimate child. It has been held also that upon the death of an adopting father leaving a widow and an adopted child, the widow's share of the estate is fixed by that section of the statute which is applicable when the intestate dies leaving children surviving him.

The terms "bodily heirs", "issue" or "children" in gifts to the "bodily heirs", "issue" or "children" of persons other than the testator or settlor, or in gifts over if a person other than the testator or settlor dies without leaving bodily heirs, issue or children, seem primarily not to include an adopted child. On the other hand, where the testator or settlor makes a gift to his own children, it has been held to include a child adopted after the making of the will or settlement, when at the time of the making of the will or settlement the testator or settlor had no child living. When, however, the testator had a child living at the time of making the will or settle-

ment, the subsequently adopted child was held not to be included.

Where there is a gift to the heirs of A, it has been held that an adopted child of A was not included, and that it was.

§ 99. **Guardian and ward.** Closely connected with the subject of rights and liabilities between parent and child is that of the relation of guardian and ward. The ancient guardianship of minor children by the lord (guardianship in chivalry), that was one of the incidents of military tenures for the profit of the lord, is described in the History of Real Property, § 8, in Volume V of this work. This was abolished by statute in 1660, and, in its stead a father was permitted to name, by deed or will, a guardian for such minor children as he might leave, until they were of age (testamentary guardianship). During the life and fitness of the father for the position, he is by law the natural guardian of his minor children, and, upon his death or incapacity, this right passes to the mother, unless the father has appointed a testamentary guardian. The rights of guardianship of father, mother, other relatives, and testamentary guardians are regulated very generally in this country by statutes, which have tended to equalize the rights of the parents.

§ 99a. **Control of guardians by courts.** In England the court of chancery assumed jurisdiction over the persons and property of infants, and similar powers were early exercised by American courts of equity. These courts controlled the actions of natural or testamentary guardians, removed them for unfitness, and appointed guardians to take their place or where no guardians ex-

isted. These equity powers have, in America, today quite generally been bestowed upon special statutory courts, usually called probate, surrogate, or orphans' courts, which in addition administer the estates of deceased persons.

§ 100. **Powers and duties of guardians.** A general guardian is entitled to the custody and rearing of the ward, and to the management and control of the ward's property, subject to the control of the court. This is exercised so as to promote the child's best interests, which sometimes, especially in the case of very young children, demand that another than the legal guardian have temporary or permanent custody of the ward. As regards the ward's property the guardian has wide powers. He may possess the property, manage it, pay and collect debts, bring and defend suits, sell personal property, and make investments. While he cannot make the ward personally liable on contracts for the benefit of the estate, he can charge against the estate proper liabilities thus incurred. His principal limitation is in dealing with the ward's real property. He can lease this during his guardianship or the ward's minority, but he cannot buy, sell, or mortgage realty except under a special power for this purpose, or by order of court, which, in some states, it is thought a court cannot make unless empowered by statute. In general, the relation of the guardian to his ward is a fiduciary one, carrying with it the ordinary limitations upon the fiduciary in dealing with the property and other rights of the beneficiary. See Trusts and Trustees, in Volume VI of this work. At the termination of his office the

guardian must account to the ward, subject to the approval of the appropriate court, for all property received and administered by him during his term. He may charge the estate with all sums properly spent in its management, or for the support and education of the ward, and he is not liable for losses not due to imprudent management. He is ordinarily entitled to reasonable compensation for his services, which in some states is a commission fixed by statute. It is customary to require a bond of guardians who handle property of a ward, the amount and conditions of which are subject to judicial or statutory control.

§ 100a. **Termination of guardianship.** The guardianship is terminated by the death of either guardian or ward, the coming of age of the ward, the marriage of a female ward, or by the resignation or removal of the guardian.

The whole subject of guardian and ward is today so extensively regulated by diverse statutes or rules of court in the various states that a more detailed statement regarding it cannot be made within permissible limits of space.

PART IV.

INFANTS.

CHAPTER XI.

PERIOD OF INFANCY.

§ 101. **When an infant is of age.** The common law period of minority was under twenty-one for both males and females. This has been modified in many places by making the age of majority for females eighteen. In some states a woman of any age when lawfully married may exercise all the powers of a married woman as if of full age. In some all minors, male and female, attain their majority by marriage.

The exact moment that an infant comes of age sometimes is important—for instance, when one is indicted for selling liquor to a minor, or where one is indicted for illegal voting because he had not at the time of voting attained the age of twenty-one. The rule is that the infant —let us call him A—comes of age on the first moment of the beginning of the day before he celebrates his twenty-first birthday. Thus, if he were born at ten a. m. on January 1st, 1888, he would celebrate his twenty-first birthday on January 1st, 1909, but he would be legally twenty-one at the first moment past midnight at the beginning of the 31st day of December, 1908 (1). This comes from

(1) State v. Clark, 3 Harr. (Del.) 557.

the fact that for many purposes of reckoning time, including this one, the courts will not consider fractions of a day. Hence, A is regarded as born at the first moment of the day of January 1st, 1888. As a corollary to the above principle, the courts regard many legal acts as complete at every moment of the day on which the legal act first becomes complete. Since, therefore, A would complete his twenty-first year at the last moment of December 31st, 1908, he is twenty-one in legal contemplation at every moment of that day, and hence from the first moment of it. To the policy of this method of reckoning the lapse of time, in this and similar cases, there has been little objection, as the inconvenience of regarding fractions of a day and of fixing particular times of a day within which acts must be done is apparent.

§ 102. **Of age earlier for certain purposes: Wills.** While not attaining majority generally until a certain age, usually twenty-one, infants may have full capacity to do certain acts earlier. For instance, the power of a minor to make a will of real estate will depend upon the express authority given to him by statute. These generally require that the infant be of age. But the power of a minor to make a will of personalty exists apart from the express permission given by statute. Following the rule applied in the English ecclesiastical courts with reference to wills of personalty, it has been held in this country, in the absence of statute to the contrary, that a male over fourteen and a female over twelve, may make a will of personal property.

CHAPTER XII.

CONTRACTS AND CONVEYANCES OF INFANTS.

§ 103. **Difficulty of the subject.** Of course, the law attempts to protect infants from the consequences of their acts. It is apparent, however, that the result may be to give mature minors a means of defrauding innocent persons. Thus, while no harm can come from allowing a child of tender years complete disability and power to avoid his attempted legal acts, yet the moment you give the same immunity to minors, of say from sixteen to twenty-one, you enable them to mislead third parties and to obtain undue advantage by relying upon their disability. The problem of the common law has been to give infants protection and yet prevent a mature and cunning minor from using his infancy as a means for perpetrating frauds and losses upon others. The result has been a striking failure in various English and American jurisdictions to present results which are either consistent or coherent. It may be said that the results furnish a disappointing example of attempted judicial legislation. The decisions in the different states present a remarkable variety of rules. The decisions in particular states seem in many instances to indicate that different rules have been applied in the same state at different times. Since the courts only act in particular cases, the rules are laid down piecemeal. Sometimes they appear to be founded

upon one view of public policy which seeks to protect the infant, and sometimes on another which seeks to protect adults from the infant's fraudulent use of his inability. When laymen and lawyers alike approach the subject of infants' contracts and conveyances, they must be prepared for a state of chaos.

Section 1. Enforceability of Contracts Against Infants.

§ 104. **General rule of non-enforceability.** Probably the most generally observed rule with respect to infants' contracts is that when the infant is being sued upon the contract (no question of affirmance being involved), the fact of infancy at the time the contract was entered into is a complete defense. It makes no difference how great the benefit which the infant has received may have been, or how completely he may have used up or wasted what he received while still an infant, so that he is unable to tender anything back. The general rule clearly is that no judgment can be recovered against him. But no sooner is this broad general statement made than we are obliged to hedge it about with exceptions. Thus, in New Hampshire it has been held that the infant who has received the benefit of chattels bought is liable for their fair value, although infancy is a good defense to the price agreed to be paid (1). The position of the New Hampshire court is, it is believed, unique.

§ 105. **Infant's false representation that he is of age.** If the infant induces the contract by his false representa-

(1) Hall v. Butterfield, 59 N. H. 354.

tion that he is of age, is the infant in such a case liable on the contract? In the courts of law as distinguished from the courts of chancery it was formerly held that the infant, even in such a case, had a sufficient defense to any judgment against him. In the courts of chancery, however, it was thought that the infant's conduct had reached a point where the defense of infancy, if allowed, would permit the infant to use his defense of infancy to perpetrate a fraud. If, therefore, the proceeding against the infant in the court of chancery was such that the court would give a decree against the infant for money due or enforce the infant's conveyance, the defense of infancy would not avail.

Logically, the court of chancery should have been prepared to enjoin the infant from setting up the defense of infancy in a suit at law where he was being sued for the price of goods purchased, in cases where the contract was induced by the infant's false and fraudulent representations. It seems, however, that the English courts of chancery have confined their enforcement of the infant's contract or conveyance, in case the infant was guilty of fraudulent representations, to those cases where full relief was given in the equity suit itself (2). If the suit was at law the court of chancery left the result to be determined according to the strict rules of law applicable. In this country, however, at least one respectable court took the step of enjoining the setting up of the defense of infancy in the suit at law, thus allowing a recovery to be had

(2) Bartlett v. Wells, 1 B. & S. 836.

against the infant (3). Logically also, in states where the distinction between law and equity is abolished, and one recovers upon the contract on any ground which is valid in law or administered by any court, the tendency is to adopt the general rule of liability on the part of the infant which was recognized by the English court of chancery. But even here there is no certainty of result, for the Supreme Court of the United States can be found holding that the infant is not liable where the whole proceeding is in equity, the court insisting upon applying the rules applicable in courts of law (4).

Suppose the infant conveys to A, and when he comes of age he conveys to B. Ordinarily the conveyance to B is regarded as a disaffirmance of the conveyance to A, and B prevails over A. Suppose, however, that A took the conveyance and paid his money on the false and fraudulent representation of the grantor that he was of age, so that in a court of equity the infant cannot get his land back. That is a mere equity in favor of A and if B takes without notice of the facts which give rise to A's equity to enforce the conveyance from the infant, B must prevail over A, as English courts have held (5). But there are American decisions contrary and one decision in Canada which relies upon the existence of the recording acts, though in what way the recording acts strengthen A's position against B, it is difficult to understand (6).

(3) Ferguson v. Boba, 54 Miss. 121.

(4) Sims v. Everhardt, 102 U. S. 300.

(5) Inman v. Inman, L. R. 15 Eq. 260; Black v. Hills, 36 Ill. 376.

(6) Damron v. Commonwealth, 61 S. W. (Ky.) 459; Bennetto v. Holden, 21 Grant's Eq. (U. C.) 222.

§ 106. **Necessaries: In general.** The best known exception to the general rule that an infant is not liable upon his contract is the infant's contract for necessaries. It is commonly said that an infant is liable on his contracts for necessaries. Of course it is known that there may be some doubt as to what are necessaries, but it is said that necessaries clearly include food, clothing, lodging and some education, and that the extent to which articles of this sort are necessaries is governed generally by the infant's station in life. The fact is, however, that the liability of infants for necessaries is full of subtilties and pitfalls for the unwary tradesman who trusts an infant.

§ 107. **Infant not liable on his contract for necessaries, but only for the fair value of what he has received.** The infant is not liable for what he promises to pay for necessaries, but only for the fair value of what he actually receives and uses. Hence, the infant can repudiate at any time before receiving anything and he incurs no liability. For instance, a young woman has contracted to take a course in stenography and to pay a certain price therefor, and before starting on the course has changed her mind. In accordance with the same principle the infant cannot be sued on a promissory note given for necessaries. But the reason is only a procedural one, for the plaintiff may disregard the note and sue for the fair value of the goods furnished. Some courts have, therefore, in order to prevent the hardship of a perfectly good suit failing because the plaintiff has sued on the note instead of for the fair value of the articles sold, allowed the suit on the note

to stand, but restricted the plaintiff to recover for the fair value of the goods sold and delivered.

If the infant receives part of what he has ordered in the way of necessaries he may then repudiate, and his liability will be only for the fair value of what he has actually received. Thus, a college student who had rented a room for a year and given it up in the middle of the year, was not liable for damages by reason of the failure to use the room during the portion of the year when he had left it (7).

§ 108. **Infant not liable unless he actually needs the articles furnished.** It appears also to have been a good defense to the infant that the articles purchased were not necessaries because the infant already was sufficiently supplied with these same articles. But more than this, some courts have insisted that the burden of proving that the infant was not sufficiently supplied was upon the tradesman who was attempting to hold the infant liable. The difficulty of sustaining such a burden of proof is obvious.

Probably the fact that the infant has sufficient property of his own so that he is under no necessity of pledging his own credit, but could pay cash, does not interfere with the liability of the infant for his necessaries. At least one court in this country seems to cast doubt upon this proposition, however (8).

It is frequently said that the infant cannot be liable for necessaries when he is living with or being maintained

(7) Gregory v. Lee, 64 Conn. 407.

(8) Nicholson v. Wilborn, 13 Ga. 467.

by his parents in the usual manner. This really comes to this: that the parents who are caring for a minor child have a very wide discretion to determine what articles the infant actually needs in his station in life, and when the judgment of the parents is being fairly exercised and not abused, nothing that the infant purchases can be regarded as a necessary. Some jurisdictions seem to have pressed this view so far that no recovery can ever be had against the infant unless it is proved by the plaintiff that the parent or guardian is in default.

§ 109. **What are necessaries.** The term "necessaries" embraces necessary articles for the support of the wife and children, if there are such to maintain. The wants to be supplied to the infant or to the wife and children are, however, such as are personal to the infant or to the wife or children, such as "those for the body, as food, clothing, lodging, and the like, or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood" (9). There are some rather extreme cases to be found in the books, holding articles necessaries. Thus, it has been held that a bridal outfit, including a chamber set, is a necessary (10); and that a telegram sent to an infant's parents requesting some money was one (11). Where the minor has no guardian his contract with an attorney for services

(9) Tupper v. Caldwell, 12 Metc. (Mass.) 559.

(10) Jordan v. Coffield, 70 N. C. 110.

(11) W. U. Tel. Co. v. Greer, 115 Tenn. 368.

in securing the minor's estate or claim, has usually been regarded as made for necessaries (12). But contracts made by an infant in the course of carrying on a business are not for necessaries. Neither are those for the repair, improvement, or insurance of his real estate, or for insurance on the infant's life, and a college education in the circumstances of one particular infant was held not to be a necessary. But a course in stenography was regarded as a necessary for a young woman in Georgia (13).

It is frequently said that such articles as are appropriate to the infant's condition in life and social position, are necessaries. Such a statement is, it is believed, misleading. Among those articles above mentioned which are possible necessaries, such as food, clothing, lodging, and some education, the amount which the infant may be held for as a necessary will depend upon his position in life and social station. But no matter what his position in life and social station may be and no matter what amount of the articles in question he may be entitled to purchase, the articles themselves must still be of the class of necessaries as distinguished from luxuries or indulgences. Thus, where a university student is sued for the price of suppers and entertainments given in his rooms, and it is admitted that these suppers and entertainments are entirely suitable and consistent with his social standing, nevertheless, since they are not necessaries, but indulgences, the infant should not be held for their price.

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(12) Munson v. Washband, 31 Conn. 303.

(13) Mauldin v. Southern Shorthand Univ., 126 Ga. 681.

§ 110. Unclassified exceptions to the rule that infants are not liable on their contracts. An early English case appears to have held that when an infant takes a lease and occupies the premises and continues to do so after he comes of age, he precludes himself from disaffirming the lease or pleading with success his infancy to a suit for any of the rent, whether it accrued before or after he came of age. As the case is reported, however, it gives color to the proposition that the infant is liable for the rent because he has received the benefit of the lease and for this he must pay, even while an infant, although it is not a necessary. One case in the Irish reports has adopted this result and held the infant liable to pay rent while an infant (14). It is believed that this holding, if limited only to rent, is illogical; and the broader proposition that the infant is liable for what he receives and uses up, is clearly not the law. It is necessary, however, to notice the existence of this case, for its presence and the attempted explanation of it, has been the source of much confusion.

There are a number of instances, however, where the liability of an adult would depend upon the operation of some rule of law or statute, apart from his consent, and where under similar circumstances the infant is also bound. Thus, when the law makes a man liable for the ante-nuptial debts of his wife, if a minor marries he also is liable in the same way. So, when an infant is liable for the support and maintenance of his bastard child, he may be liable on his contract to discharge that obliga-

(14) Blake v. Concannon, 4 Ir. Rep. C. L. 323.

tion. In bastardy proceedings where the defendant is allowed to give bond to escape arrest, the same privilege is held to extend to an infant, who upon giving the bond thereupon becomes liable upon it. So, the authority to put up a bond in place of goods taken on attachment or replevin, is held to extend to an infant, who becomes liable upon such bond. In a Kentucky case it was intimated that an innkeeper who was obliged to receive an infant can have a judgment against him for his board and lodging, although the same were not under the circumstances necessaries (15).

Section 2. Infant's Right to Disaffirm Transaction and Recover Consideration.

§ 111. Distinction between the infant's defense and his right to recover back. As the law has developed, it by no means follows that the infant's right to recover back, after he has paid for a purchase or sold for a price, is as extensive as his defense to suits against him. On the contrary, it is quite clear that the infant's right to recover back is much more restricted than his right to make a defense.

§ 112. Obligation of infant to return benefits or an equivalent. The restrictions upon the infant's right to recover back what he has parted with have developed in the line of requiring the infant to return the benefit which he has received, or its equivalent, as a condition precedent to recovering back; or he has been compelled to suffer a deduction from the amount which he recovers

(15) Watson v. Cross, 2 Duv. (Ky.) 147.

back equal to the benefit which he has received. The decisions of the courts upon this matter present an amount of confusion and conflict which it would be difficult to exaggerate. Not only are the results worked out in different jurisdictions hopelessly at variance, but even in the same jurisdictions there are curiously conflicting lines of decisions.

§ 113. **The variety of results reached.** Taking the language of the courts and the reasoning of their opinions, the cases seem to present the following variety of propositions.

1. When the plaintiff has received no benefit he can recover back as a matter of course. The leading case of this sort is one where the infant subscribed for shares in a corporation, which were allotted to him. He received no benefit, however, from the allotment, other than the satisfaction of being the holder of shares. Therefore, the court considered the case as if he had received nothing (16).

2. The plaintiff cannot recover back at all if he was a buyer and has received full value for what he paid. This does not mean that the infant before he can recover back must tender all he has received or its equivalent. It perhaps means only that he must suffer a deduction for the fair value of what he has received.

3. If the plaintiff is a seller of land or a chattel, as a condition precedent to recovering back he must tender all he has received or its equivalent. This rule is espe-

(16) Hamilton v. Vaughn, L. R. (1894) 3 Ch. 589.

cially applied in courts of chancery, but it has also been applied in courts of law.

4. The infant, when he is the buyer of a chattel, must suffer deduction for all he has received, even when it is used up by him during his minority and no longer exists. The principal case of this sort is one from New York where the infant purchased a bicycle and agreed to pay for it by installments. After using the bicycle and paying a few installments, he disaffirmed and sued to recover back what he had paid. It appearing that the amount paid was equal to the fair rental value of the wheel, he was not allowed to recover anything (17).

5. The infant when a buyer must suffer deduction for all he has received, only provided the defendant sustain the burden of showing that the contract was fair and reasonable and that the infant received full value for what he gave. The leading case in favor of this rule is one where the infant purchased life insurance and upon disaffirming and attempting to recover back he was obliged to suffer a deduction for the value of the protection which he had received and could only recover the excess which was represented by the value of a paid-up policy at the time of his default (18).

6. The infant cannot recover back at all unless he actually tenders back what he has received and has in his possession.

7. The infant, when a seller of land or chattels, can re-

(17) Rice v. Butler, 160 N. Y. 578.

(18) Johnson v. Northwestern Mutual Life Ins. Co., 56 Minn. 365.

cover back without returning that which he has wasted or used up while a minor.

8. The infant plaintiff who is a seller can recover back without even any tender, where he is still possessed of part of the consideration.

9. The infant plaintiff need suffer no reduction whatever for what he has received and used up, and it makes no difference that he is a buyer. This last extreme is to be found in the Massachusetts cases, where the same bicycle case above referred to arose and it was held that the plaintiff could recover without suffering any deduction for the use of the wheel (19). Another case arose in Massachusetts, where the infant purchased life insurance and where he was allowed to recover back all he paid, including the premiums which had been used up in the life insurance protection which he had received (20).

§ 114. The variety of results reached in a particular jurisdiction. If we look only to the language of the courts we often see apparently hopeless conflict even in the cases of a single jurisdiction.

In England the cases seem at the present time consistent with one rule, and that is that the infant where he has received a benefit must at least suffer a deduction for the fair value of the benefit which he has received.

The New York cases seem much at variance. Early New York cases started with the doctrine of the English courts. Then came the well-known case of Green v.

(19) Gillis v. Goodwin, 180 Mass. 140.

(20) Simpson v. Prudential Ins. Co. 184 Mass. 348.

Green (21) where the infant was a seller and it was held that he could recover back without tendering what he had received where he had wasted it prior to his majority. Then came the bicycle case where the infant was obliged to suffer a deduction of the fair value of what he had received from the amount which he could recover.

In Massachusetts the earlier cases seem to start out with an approval of the doctrine of the English courts. Then in a case where the infant was a seller he was allowed to recover back regardless of whether he had wasted the consideration or not, without any tender or suffering any deduction. The most recent Massachusetts cases apply the same doctrine, even where the infant was a buyer, as in the bicycle and insurance cases above referred to.

Minnesota seems to have begun as Massachusetts has ended, and then evolved in the opposite direction toward the doctrine of the English cases.

Texas seems to have begun with the English doctrine that the infant must give up or suffer deduction for all he had received, and latterly has receded to the doctrine that the infant need only give back what he has left.

Kentucky began with the extreme doctrine that the infant must absolutely return the consideration which he has received or its equivalent before he could recover back, and then developed somewhat like Texas, to the opposite doctrine.

The above statements do not purport to be the last close analysis of the cases in the jurisdictions referred to, but

(21) 69 N. Y. 553.

they indicate in a rough way the apparent fluctuation of opinion that has occurred in many courts as to the infant's right to recover.

§ 115. **Suggested distinction between the infant's buying and selling.** It has been suggested that an infant ordinarily has no business to sell anything and that he should be specially protected from parting improvidently with his property. Hence, when he sells he should have a special right to recover back, and be under no obligation to restore more than he has left, if anything. On the other hand, infants must be expected to buy something, and in the interests of the freedom of selling, an infant who buys and pays, must stand by the transaction and can recover back only when he has at least deducted the fair value of what he has received. This seems a plausible and practical line of distinction to take. It is very questionable, however, whether courts have really taken it.

In the English cases where the infant did not recover back he was a buyer of a lease in one case, and of a chattel in another. But in another case where he did recover back he was also the buyer of shares of stock in a corporation. It would be interesting at the present day if the case came up where the infant was a *seller* for cash and had wasted the cash during infancy, and then attempted to recover back. If he was there allowed to recover back without suffering any tender or reduction, it would be a strong case for establishing a difference between the infant's buying and selling. As a matter of fact the language of the opinions in the English cases point simply

to the test of whether the infant received any benefit or not, and presumably to the extent he received the benefit he must account to the purchaser whether he is a buyer or seller.

In New York where the infant was not allowed to recover back without tender of what he had received or suffering a reduction for what he had received, he was a buyer; while in the leading case of Green v. Green (22), where he was attempting to recover back after he had wasted the proceeds during infancy, he was a seller.

In Massachusetts where the infant was allowed to recover back without any deduction of any sort or any tender, he was a seller; but the same rule exactly was enforced where the infant was a buyer.

In Minnesota we find that where the infant was allowed to recover back without any obligation to return what he had received when wasted, it was a sale by the infant; while in the later case where the infant was a purchaser of life insurance, he could not recover back premiums paid without suffering a reduction for the insurance which he had had the benefit of.

In Texas the court began with the proposition that even when the infant sold land he could not recover it back unless he tendered back all of the purchase price, apparently whether he had it or not. At a later day this was modified so that he could recover back if he returned or deducted what he had left.

If an exchange of property amounts really to selling by

(22) § 114, above.

the infant in spite of the fact that he is also buying, then Kentucky started out to hold that where the infant sold a chattel he could not recover back without offering to return all he had received, even though he had used it up. More recently, where the infant sold real estate, he was allowed to recover it back by returning or suffering a reduction for what he had left.

It would appear then that the decided cases do not support the suggested distinction.

§ 116. **Summary.** However the matter be looked at, it is believed hopeless confusion still exists. The distinction between buying and selling may possibly aid in the future development of the law, but at the present time it is little regarded.

§ 117. **Deduction of damages due to disaffirmance.** Must the infant suffer deduction for damages caused the defendant by reason of the infant's disaffirmance? To this question, "no" seems the only answer consistent with the infant's right to defend a suit against him for breach of contract. Yet respectable courts will be found requiring a deduction by the infant for the exercise by him of his right to disaffirm.

§ 118. **Contracts for services.** When the infant sells his services and labor and receives payment, he can disaffirm and sue to recover back, but clearly he cannot recover back what he has given in specie. He can only recover for the value of his labor and services. It seems to be settled generally in this country that even where he may recover back a chattel sold without tendering back anything or suffering any deduction, he must suffer a deduction for

the amount which he has received for his services. A sound public policy in favor of the infants themselves dictates this, for infants must often sell their services and labor for their own benefit, and when the contract is fair and reasonable it is highly unwise to allow every infant who works to spend what he receives and then recover all his wages over again. It would seem also that since the infant recovers for the fair value of his services it would be perfectly proper to make deductions for the unskilled way in which he has performed his services resulting in damages to his employer's property.

§ 119. **Contracts for necessaries.** Although when the infant is sued for necessaries he is only liable for their fair value, yet where he has paid for them and attempts to recover back, it seems he is completely bound by the payment and cannot, in the absence of fraud and perhaps unfairness, recover for the difference between what the necessaries were worth and what he gave for them. This also seems to proceed upon a sound public policy in favor of the infant, because, while injustice may be done the infant in particular cases, yet it would be a great obstacle in the way of an infant's buying necessaries at all if he could afterwards open up the transaction.

§ 120. **Partnership contracts of infants.** When partners are sued as such upon a contract, and one of them is an infant, the infant can defend on the ground of infancy and no personal judgment can be rendered against him. But judgment can still run against the other partners, and the whole partnership assets, including the infant's share, will still be liable to satisfy the partnership debt. So,

when the infant sues to wind up the partnership and seeks to recover back what he has put into it while an infant, he cannot claim ahead of the partnership creditors. This holding seems consistent with the theory that a partnership is legally, as it is commercially, an artificial person apart from the partners themselves, and that so far as third parties are concerned it is of no more account that one partner is an infant than it is that one stockholder of a corporation, with which the stranger is dealing, is an infant.

But the courts have gone a step farther and held that even when all the creditors have been paid, and the suit is by an infant against a partnership in equity to wind it up (so that it is more truly a suit against the artificial person of the partnership), yet the infant cannot recover back what he has put in to the disadvantage of the other partners, but all must divide according to their respective shares in the partnership. The same holding obtains when the infant sues one of his partners at law to recover what he has paid into the partnership. In this case, however, there is an added answer to the infant's suit, that he had put into the partnership just as much as his partner did.

The rule that the infant cannot recover back from the partnership at all seems to be a special rule relating to infants' partnership transactions. It is properly noted as an exception to the infant's right to recover back, as no principle peculiar to partnership law would seem to account for it.

§ 121. **Acts done by an infant's direction.** It is clear that acts which the infant has directed his agent or another to do, the infant cannot repudiate so as to hold responsible the agent or the party so acting.

§ 122. **Acts of infant's counsel in the course of litigation.** When an infant sues he must do so by his "next friend" or "guardian." If an infant defends he cannot be defaulted and must be represented by a guardian ad litem. The next friend or guardian ad litem is an officer of the court and can employ counsel, and what is done by that counsel in the course of the litigation will, it is believed, bind the infant. The usual case that arises is where the counsel representing the infant's interests compromises the suit, submits to a verdict, and judgment is entered pursuant to the compromise.

§ 123. **Rights of adult after disaffirmance by the infant.** Upon disaffirmance by the infant title to what the infant received revests in the adult. This is clear and well settled. But suppose the infant has transferred the property theretofore received by him before he disaffirms. Can the adult upon disaffirmance pursue the property into whosoever hands he may find it? The courts have not yet answered this question. It has been held, however, that the adult can follow the proceeds of what the infant received from him into other property remaining in the infant's hands. Thus, where money was loaned to an infant to pay taxes on land, take up a mortgage, and satisfy judgments, upon a disaffirmance by the infant the lender was entitled to a lien upon the land to the extent the money loaned had gone to pay prior liens and taxes; and

so far as it went into improvements the lender had a lien for the balance of the loan on such interest in the land as remained after deducting the value of the lot at the time of the disaffirmance, without taking into consideration the value of the improvements (23).

§ 124. **How far disaffirmance relates back.** How far does the infant's disaffirmance cause the acts avoided to be void by relation back to the time they were made? Where the infant sells and then disaffirms, it is often said that title revests in him by relation back from the time of the sale. It seems, however, that this is not so to such an extent that the buyer from the infant is liable as for a wrongful taking of goods by reason of the fact that he sold them before disaffirmance. But the infant's disaffirmance of the sale so far changes the transaction from the beginning that what the buyer from the infant has expended to keep up the property—for instance, fire insurance—is considered as done at the infant's request, for which he is liable , and against which he is not permitted to plead his infancy. Upon disaffirming a sale by an infant the infant may recover for use and occupation, but the adult buyer may set off the value of improvements which he has made.

Where the infant is the buyer, and disaffirms, it is said that the transaction is void from the beginning. But this is not so to such an extent that the infant who has sold the article before disaffirming is liable for wrongful dealing with the goods of another by relation back. On the

(23) Utermehle v. McGreal, 167 U. S. 688.

other hand, it does seem to relate back so far that the infant may consider himself as the lawful custodian of the chattel, holding the same at the request of the seller, so as to be entitled to a statutory lien upon it for feeding, where the chattels sold to the infant were cattle (24). This last is a curious result. The disaffirmance by the infant seems not to make the whole sale void from the beginning, but to give the transaction an entirely new character, not originally, nor at any time afterwards, in the contemplation of the parties.

Section 3. Status of Infant's Acts Before Affirmance or Disaffirmance.

§ 125. Various possibilities. With reference to the infant's power to affirm or disaffirm, there are four possible situations: (1) The defendant's act may be void in toto and not subject to be affirmed. (2) It may be valid not subject to be disaffirmed. (3) It may be void but subject to be affirmed. (4) It may be valid but subject to be disaffirmed. The importance of determining into which of these classes an infant's given act falls is apparent.

§ 126. Acts of infants which are void and not subject to be affirmed. These have now been reduced to the minimum. It seems that the infant's warrant of attorney to confess judgment, incorporated into what is usually known as a judgment note, is wholly void and cannot be affirmed. This is settled by what is sometimes called "the weight of authority." Many courts treat it as merely an historical survival. Some jurisdictions have

(24) Tower-Doyle Commission Co. v. Smith, 86 Mo. App. 490.

undertaken to hold, as a logical deduction from this, that the appointment of an agent by an infant for any purpose is wholly void, and that all acts done by the agent are therefore wholly void and cannot be affirmed. But the more enlightened view is, it is believed, that the only act of an infant which is absolutely void is the warrant of attorney to confess judgment, and that the appointment of an agent by an infant to do other acts, and the acts so done by the agent, stand on the same footing as acts of the infant which belong to the second, third and fourth classes of infant's acts referred to above, and not to the first.

§ 127. **Acts of infants which are valid in some degree at least, and not subject to be disaffirmed.** These also are a small class. In a way they have been indicated in §§105-110, above, which deal with necessaries and other exceptional contracts to which the infant has no defense, or where his fraud has deprived him of his usual defense.

§ 128. **Acts of infants which are either subject to the defense of infancy unless affirmed, or not subject to the defense of infancy unless disaffirmed.** It may fairly be said that most infant's contracts and conveyances fall into one or the other of these classes of cases. But which one? Obviously this is the question of vital importance when the question arises whether the infant to make good his defense of infancy must positively disaffirm, or to make good his act must positively affirm. As a matter of fact there is no logic or wisdom in having two arbitrarily drawn classes of cases—one of one sort, and one of another. It is believed that the whole question of whether

an infant's act belongs to one or the other of these two classes may be successfully eliminated by regarding the infant's acts as requiring *positive disaffirmance* or interposition of the defense of infancy, and then considering only what conduct on the part of the infant when he comes of age will *preclude the interposition of the defense.*

§ 129. **Lapse of time after infant comes of age as affecting the defense of infancy.** Mere lapse of time after the infant comes of age—that is to say, mere failure to act on the infant's part when he comes of age—is of varying importance in precluding him from his defense of infancy. Much depends upon the character of the transaction to which his defense of infancy is interposed. Thus, whenever the effect of the infant's disaffirmance is merely to prevent the recovery of money by one who loaned it to him, mere inaction on the part of the infant and the lapse of time after he comes of age is of no relevancy whatever in precluding him from setting up the defense of infancy. In such cases a *mere acknowledgment* of the debt after the infant comes of age is not enough to preclude him from setting up his defense of infancy, but a *new promise* to pay is required.

On the other hand, when the effect of the infant's disaffirmance is to enable the one dealing with the infant to recover back a consideration in the infant's hands and *sold to the infant,* mere lapse of time after the infant attains twenty-one is very important. The holding and use of the chattel purchased for an unreasonable length of time after the infant becomes of age is usually, if not universally, regarded as an act which precludes the infant

from setting up his defense of infancy. Of course, if the infant sells the chattel after he comes of age he is precluded from setting up the defense of infancy.

Now suppose the effect of the infant's disaffirmance is to enable him to get back property conveyed by him to a third person, *i. e.*, where the case is one of an *infant's sale to an adult.* Here the authorities are somewhat in conflict as to whether the mere lapse of time or inaction on the part of the late infant will preclude his recovering back upon disaffirmance. On the one hand, he is using his infancy to recover back, so there is a natural tendency to give him less aid than when he is defending. That makes for the rule that he must act within a reasonable time after he comes of age, or he will be cut off from any recovery back. On the other hand, he has parted with title to his property while still an infant, and the inclination to give him the full benefit of his disability in order to prevent the wasting of his estate, is very great. These conflicting lines of policy probably account for the somewhat different rules in force in different jurisdictions. Thus, in one leading case the infant who delayed disaffirming for six years after he came of age, was precluded (25); while in another leading case it was held that mere inaction on the infant's part could not preclude him from disaffirming (26).

§ 130. Status of infant's acts where collaterally involved. In the absence of disaffirmance, shall the infant's acts be treated as valid or as void between the

(25) Prout v. Wiley, 28 Mich. 164.

(26) Goodwin v. Empire Lumber Co., 31 Minn. 468.

parties themselves and as regards third parties? Like most questions on infant's contracts, it is difficult to make any definite answer to this one. Perhaps the infant's act is more often treated as valid, though subject to be avoided. Thus, it has been held that an infant's promise of marriage is so far valid, before disaffirmance, that it is a good consideration for the adult's counter promise of marriage, so as to make a valid contract to marry between them. So, when the plaintiff, in suing for land or chattels from a stranger, depends upon title from an infant which has never been disaffirmed, the defendant cannot take advantage of that to defeat the plaintiff's right to possess or title.

CHAPTER XIII.

AGENCY, TORTS, AND CRIMES OF INFANTS.

§ 131. **Capacity to act as a public official.** If the acts of the public official are merely ministerial—as where he is a deputy sheriff—there is no objection to an infant's performing the duties. But if the duties of the public official require the exercise of discretion, as in the case of a justice of the peace, the infant is not eligible and cannot discharge the duties of the office; and any one deprived of his liberty by the writ of an infant discharging the duties of such a position may be discharged from arrest upon a writ of habeas corpus.

§ 132. **Capacity to act as a private agent.** There can be no doubt about the infant's capacity to act as a private agent. Even where the duties of the agent involve the selling of real estate he may act.

§ 133. **Liability for torts.** The infant is liable for his torts. So long as no particular mental attitude is required for the tort it makes no difference how young he may be. Thus, an infant of six years could be guilty of trespass on the plaintiff's real estate. It is no defense to the infant that he acted under the direction of his parent. So, an infant may be liable for slander. Whenever the tort depends upon the negligence of the infant the infant's age may become relevant, for there is an age

with every child, varying no doubt with the particular child, when it is impossible to charge it with sufficient knowledge and experience to cause it to be guilty of negligence. It has been held, however, that a particular child of thirteen years old could be guilty of negligence.

§ 134. Torts connected with contracts. A tort may be connected with a contract in the following ways.

1. The tort—usually fraud—may be committed in order to induce the contract. For instance, the infant falsely represents himself to be of age. All the authorities agree that in such a case the tort is not so closely connected with the contract that the infant is not liable for it.

2. Sometimes the tort—usually fraud—is subsequent to the making of the contract. For instance, where the infant makes false representations in order to secure the delivery upon credit of the article purchased. In such cases also it would seem that the tort is not so closely connected with the contract that the infant should not be liable for it.

3. In a few cases the very act which constitutes the infant's promise also involves the false representation which is the foundation of the tort. For instance, in the case of a false warranty of a chattel sold by the infant, the promise which is the basis of the contract is also the false representation which is the basis of the tort. In these cases courts have thought it necessary, in order to preserve the infant's defense to any action on the contract, to hold that the tort action should be denied too, and this has been done.

4. In a large class of cases the act which is the tort is also the breach of the contract, as where the infant hires a horse to drive and over-drives it, or abuses it, or drives beyond the place which the contract of hiring specifies. Here the infant is sometimes liable for his tort and sometimes not. It seems to be a question of degree regarding the infant's acts, and whether the infant has acted too badly depends upon the exercise of a sound judicial discretion by the court. If the infant drives beyond the place named in the contract he has been held liable. If he attempts to jump the horse instead of driving it he is liable. If he merely drives it too hard over the route specified in the contract of hiring he has been held not to be liable, especially where he did not know that he was driving too hard.

§ 135. **Liability for crime.** An infant under seven years of age cannot be guilty of crime. Between seven and fourteen years it is a question of fact whether the infant actually had the guilty or criminal mind. After fourteen years of age the infant stands on the same footing with regard to the commission of crimes as adults. The matter is more fully discussed in the article on Criminal Law, § 47, in Volume III of this work.

APPENDIX A.

QUESTIONS — TORTS

§ 3. If White agreed to convey his house and lot to Gay and then refused, would his refusal be a tort? Why not?

§ 5. What is the difference in legal principle between the right that a man has not to be run over and the right that he has not to be refused admission to a hotel?

§ 7. Evans drives an automobile down a crowded street at the rate of 40 miles an hour and injures Dane. Is this tort based on intent, negligence or accident?

§ 8. If the reason why Evans had so driven was to catch a train, would that have been his motive or intent?

§ 13. Hill spits on Fales. Is this a tort and if so what tort?

§ 14. Olsen stretched a string over a sidewalk at a height of about 6 feet and when Gould came along it knocked off his hat. Olsen is sued for battery and sets up that he did not do anything to Gould. Is this a defense?

§ 15. Fair was walking along the street and somebody threw a large torpedo just behind him. The explosion made him jump and he jumped into Hull and knocked him off the sidewalk. May Hull recover damages from Fair in an action based on the battery?

§ 19. Ide writes Dane a letter and says "The next time I meet you I'll punch your head." Is this an assault?

§ 21. Suppose that thereafter Ide meets Dane on the street and as he draws near rolls up his sleeves and clinches his fists and advances to within a yard of Dane in a threatening manner. Would it be any defense to Ide if sued for assault to prove that he did not really intend to hit Dane?

§ 23. Suppose Dane was a larger man than Ide and knew that if Ide hit him he could easily overcome him. Would this fact make it any the less an assault?

§ 27. Gould inveigled Luce into an engine cab, opened the throt-

tle and jumped off as the engine started. Luce not knowing how to manage the engine was carried along for several miles. Of what tort is Gould guilty?

§ 30. A policeman said to Gay "You are under arrest and wanted at the station. Come along quietly." Gay said "I'll come but I'll come for the particular purpose of getting you put off the force, for I know you have no right to arrest me." Gay accompanied the policeman to the station and was there at once told that the officer had no right to arrest him, as was in fact the case. Is the officer liable to an action by Gay for wrongful arrest?

§ 32. Gray had Guild constantly shadowed by detectives for a week. Does this amount to false imprisonment?

§ 35. Finch is mining on his own land and runs the mine under Dean's land. Is Finch guilty of trespass on Dean's property?

§ 37. May's horse runs away with him and carries him onto Evans' land. Is May guilty of trespass?

§ 40. Fair's watch was lying on his desk and Ellis turned it around to see what time it was. Is Ellis guilty of trespass?

§ 45. Hull and Dale were horse racing in a city park in violation of a park ordinance. Hull's horse ran away with him and ran into Ide. Is Hull liable for injury to Ide?

§ 46. What is the legal difference between mistake and accident?

§ 47. Todd was cutting a tree standing near the boundary between his land and White's. The tree did not fall as Todd intended it should and fell on White's land. Is Todd liable for trespass?

§ 50. May one player in a football game sue another who had tackled him for assault and battery?

§ 52. May one of the parties to a duel sue the other who had wounded him?

§ 54. Brown shakes his fist in Tidd's face and calls him a liar and Tidd knocks him down. Is Tidd justified in so doing?

§ 55. Gray attacks Ellis with his fists. Ellis draws a revolver and kills Gray. May he justify himself on the grounds of self-defense?

§ 57. Admitting that Ellis in the last case went farther than he should, would that prevent him from suing Gray for assault and battery?

§ 58. A pedestrian was annoyed by a fox terrier that kept snapping at his heels, and killed the animal. Was he justified in so doing?

§ 59. A stranger sees a fifteen year old boy slapping a ten year

old boy and to make him stop slaps the older boy. May the stranger be sued for assault and battery?

§ 62. A tramp came upon May's porch and refused to leave when ordered. May kicked him off the porch and broke his leg. Is May liable in an action of tort?

§ 63. Dart's hens came over on Luce's land and ate the seeds Luce had planted. Luce killed them. Is he justified in so doing?

§ 64. Would he be justified if they had simply been running about his land?

§ 65. Suppose he threw stones at them to drive them away, and killed one, would he be liable?

§ 66. Olsen's buggy broke down and he backed it on Ide's land for the night. Ide found it there and put it out in the road and it was stolen. Is Ide liable to Olsen for its value?

§ 68. Dane sold a watch to Gould who paid cash, and Dane then refused to deliver the watch to him. Gould knocked Dane down and took it. Is he liable for so doing?

Would it make any difference that Dane had got possession of the watch from Gould by a trick and that it really belonged to Gould?

§ 69. A tenant whose lease had run out refused to vacate. The landlord entered and removed him, using no more force than was necessary. Is he liable for so doing?

§ 72. Ellis wrongfully took Todd's dog and carried him home and chained him in the yard. Todd entered Ellis' yard and took back his dog. May Ellis sue him for trespass?

§ 73. Would it make any difference if the dog had strayed there and was not detained by Ellis, but simply staying there?

§ 74. A steamboat was going down a narrow river and met on one side a tug boat loaded with passengers and freight and on the other a row boat with a single passenger. There was not room to go between or time to stop and the steamer ran into and sank the row boat and passenger. Do these facts constitute an excuse?

§ 75. Is a stranger who, without the invitation of the owner, enters a house that is on fire and helps carry out the goods technically liable for trespass?

§ 79. One child annoys another on the way to school. May the teacher punish it therefor?

§ 80. A woman was followed by a man who threatened to assault her and to escape she ran into an adjoining yard. Is she liable for trespass?

§ 82. A culvert on a highway breaks down so that the road is impassable and a driver goes on the adjacent land of White. Is he liable for trespass?

§ 86. Evans becomes intoxicated and because of that attacks May, a thing that he would not have done had he been sober. Is his drunkenness an excuse if sued for the assault and battery?

§ 89. Ellis saw Balch lying on the ground stabbed and saw Hull running away. He followed Hull and arrested him. It turned out that Hull had nothing to do with the attack on Balch. Is Ellis liable for false imprisonment?

Would the result be the same if Ellis was a constable?

§ 90. A crowd of men were engaged in a charivari. Gay started to arrest one of them, when he gave up all part in the performance and ran away. Gay followed and arrested him without a warrant though it was clear that he was no longer breaking the peace. Is the arrest justifiable?

§ 94. A warrant for arrest in a case of murder was issued by a court that had jurisdiction to issue warrants only in cases of misdemeanor. Is the officer serving the warrant liable in tort?

§ 97. An officer served a warrant that was all right on its face but he knew that the signature of the judge was forged. Is the officer protected by the warrant?

§ 98. If a warrant is issued and an arrest made under it and the statute under which the warrant was issued is later held unconstitutional, is the officer serving it liable to an action for false imprisonment?

§ 99. A warrant was issued for the arrest of James Robinson. There were two men of that name and the officer arrested the wrong one, but this mistake was a natural one and he acted in good faith. Is he liable for false arrest?

§ 108. A person has erected his fence so that it cuts off part of the road. A user of the road knocks the fence down. May he be sued for so doing?

§ 111. Morse erected on his own land but near Dean's house a pig pen in which he kept a number of pigs. The noise and stench from this amounted to a nuisance to Dean. What must he do in order to be justified in going on Morse's land and forcibly abating the nuisance?

§ 117. Fair borrowed Green's watch promising to return it next day. He did not do so nor for several subsequent days although re-

quested to by Green. Is this enough to make Fair guilty of conversion?

§ 124. Evans had some large mahogany boards to make furniture of. Hale cut them up into kindling wood. Is Hale guilty of conversion?

§ 123. Suppose in the above case Hale had tried to sell the boards to Dale, the sale being void because they did not belong to Hale. Would that be a conversion?

§ 126 Suppose Dale in the above case had bought in good faith and taken the boards away. Would that amount to a conversion by him?

§ 130. Dean hired Finch's horse to go to Cambridge and instead went to Lexington, much farther away, and then returned the horse to Finch. The horse died next day as a result of the long trip to Lexington. May Finch sue Dean for conversion?

Would the result be the same if just as Dean was driving the horse into Finch's stable at the end of the Lexington trip, the horse had stumbled and broken his leg?

§ 132. Fales has goods stored in Ide's warehouse and Ide refuses to allow Fales to get them. Is this conversion?

Would it make any difference that Ide required Fales to identify himself as the owner of the goods and kept them only until that was done?

§ 133. Brown left a watch with Welch, a watchmaker, to be repaired. Welch sent the watch to the factory to have the repairing done there. While it was in the factory Brown demanded his watch from Welch and he refused to let Brown have it. Is this a conversion?

§ 136. Gay left a bag of apples in an express office without saying where they were to be delivered. The company kept them until they began to spoil and then sold them. Later Gay claimed his apples and finding they had been sold brought trover for conversion. Has the company a defense?

§ 137. Fair wrongfully took Olsen's auto and used it for a week. He then brought it back and tendered it to Olsen together with $100 for the use of it. Olsen refused to take either the auto or the $100 and sued Fair for conversion. Assuming the value of the auto to be $1,000 how much may Olsen recover?

Suppose Olsen had taken back the auto, would that have been a defense against the action?

§ 139. Ellis got a loan of $100 from Hull, saying that he would

return it in a week. He did not at any time return it. May Hull sue him for deceit?

§ 142. In order to induce Fales to give credit to White, Young told him that he was perfectly sure that White had never been through bankruptcy and never defaulted on an obligation. Upon the strength of this statement Fales lent White money. In fact, he had been through bankruptcy and later defaulted on Fales' loan. May Fales sue Young for deceit?

§ 142a. Assuming that the statements in the last question were of a kind to justify an action for deceit, would it be any defense to Young that he did not expect to make anything out of the transaction?

§144. Would it be any defense that Fales made the above mentioned loan to White chiefly because he personally believed in him though he also relied to some extent on Young's misrepresentations?

§ 148. An insurance agent in order to induce a man to take out a policy told him that certain prominent men were members of the board of directors. The policy was taken out because of that statement. In fact, they were not directors, but the insured could have discovered that fact by consulting the public corporation records at the state capitol. May he maintain an action for deceit?

§ 150. Suppose the agent had said that his company was the best organized, gave the most for the money and was the safest company in the country. Would these statements if false amount to actionable deceit?

§ 154. Doe was floating a corporation to promote prize fighting in Utah and wrote to Hale in Massachusetts asking him to subscribe for some stock and saying "The law of Utah allows prize fighting and there is no doubt that the whole scheme is legal." In fact, the law of Utah did not allow prize fighting. Is this actionable deceit?

§ 158. A statute required the owners of cattle steamers to provide railings 3 feet high around the hatches to prevent the cattle from falling through. The owner of a cattle steamer neglected to put them up and as a consequence a sailor fell through the hatch and was hurt. May he recover damages therefor from the owner of the steamer?

§ 160. A railroad train negligently ran into and killed a horse and threw his body from the track in such a way that it stopped a culvert and the water backed up and damaged Todd's house. May Todd recover against the railroad company?

§ 163. A coal company imports strike breakers from a neighboring state as it has a right to do, but knowing that as a consequence the strikers would riot. May a third person whose windows are broken in the riot caused by the importation of the strike breakers hold the company responsible?

§ 168. Ellis sued Black and alleged that at a certain specified time and place Black negligently kept a large amount of high explosives without properly guarding them. Does this state a cause of action?

§ 172. A husband turned his wife out of doors insufficiently clad on a cold winter night. The cold was so intense that she froze to death. Is he responsible for her death?

§ 175. An elevator man negligently lets his elevator drop so rapidly that the air in the shaft is forced out with such violence that it knocks down a small child standing near the shaft and injures it. Is the elevator man responsible for the injury?

§ 176. Doane pushes Beal off a porch 2 feet high. Beal falls in such a way that the fall injures one of his legs. Several months later the bone mortifies and the leg finally has to be amputated. Is Doane responsible therefor?

§ 180. Allen saw a pig on the sidewalk and "sicked" his dog after it. The pig ran down the street and between the legs of Balch, upsetting and severely hurting him. Has Balch any cause of action against Allen?

§ 183. A motorman negligently tried to hurry his car across an intersecting road. A driver of a bus coming down the road also negligently tried to get ahead of the car and in the collision Ellis, a passenger in the bus, was hurt. May he recover from the street railway company?

§ 184. White negligently left an open barrel of gun-powder standing on the sidewalk. An hour later Lord negligently dropped a lighted match into it. Dale was injured by the explosion. May he hold White responsible?

§ 186. Lewis knew that Evans, a weak-minded boy, was very giddy and unable to maintain his balance on high places. He offered Evans $1.00 if he would walk across a high railroad viaduct. Evans attempted to do so, fell off and was injured. Is Lewis liable for the injury?

§ 189. Ellis took Tidd out in his motor boat. Ellis so negligently ran his engine that it exploded and Tidd, to save himself,

jumped over board and was seriously injured in swimming ashore. Is Ellis responsible for his injuries?

§ 190. Suppose the facts in the above case had been that Tidd jumped overboard because he was unused to gasoline engines and thought that the regular explosions of the engine indicated that it was about to blow up, would Ellis have been responsible for the injuries sustained by Tidd in swimming ashore?

§ 191. Gray is driving down the street in a grossly negligent fashion, Thomas is also driving in a negligent fashion but not so negligently as Gray. They collide and Thomas is injured. May he recover any part of his damages from Gray?

§ 193. Suppose in the case last given that though both Gray and Thomas were negligent, Gray had seen the situation at the last moment and could still have stopped in time to avoid the collision but did not do so. Could Thomas recover?

§ 195. Brown negligently threw some bricks out of the third story window of a building and injured Ray, a boy of 10, who was passing by. It is admitted that an adult who went so near a building under repair as Ray did would be precluded from recovery because of his own negligence. Does it therefore follow that Ray is barred from recovery?

§ 197. Suppose that in the last case Ray had been an adult and negligent in passing so close to the building, would this bar him from recovery if Brown had purposely dropped the bricks on him?

§ 200. Ellis had a gap in his fence. Ide negligently turned his bull loose in the street and he got through the gap in the fence and seriously injured Ellis. Is it any defense to an action by Ellis against Ide that the bull would not have injured him if he had had his fence in proper repair?

§ 203. A passenger is stepping off an electric car and the motorman starts the car too soon and injures him. On what ground can it be argued that the passenger cannot recover from the railroad company?

§ 205. A father on a railroad train negligently lets his 13 year old child put his head out of the window. The car is passing a freight train and a brakeman on the latter train negligently tosses a coupling pin from the top of the train and it hits the child. Is he barred from recovery because of the negligence of his father?

§ 206. Could the father recover under these circumstances for loss of the son's services?

§ 208. Suppose in the above case the child had been killed and

the right of action for the wrongful death had vested in the father as next of kin, could he have recovered under the circumstances?

§ 211. A municipal ordinance forbade the discharge of firearms in the city limits. Dale while hunting within the city limits was negligently shot and injured by Hart. Is Dale barred from recovery because of his violation of the statute?

§ 216. A patent medicine dealer manufactured and sold complexion tablets that contained a certain quantity of arsenic. He sold to the jobbers who sold to the retail druggists, from one of whom White bought some tablets for his wife who took them according to directions and was seriously poisoned. May she recover from the manufacturer?

§ 217. Could she recover from him if the compound had not contained any dangerous poison, but had nevertheless injured her, though taken in accordance with directions which provided a dose that was too great for the normal person?

§ 219. A man was loitering in the hall of a hotel, he having no right to be there. A hotel detective started toward him and he walked toward what he believed to be a side hall, but which the detective knew to be an open elevator shaft. The detective did not warn him and the man fell and was injured. Has he a cause of action against the hotel?

§ 222. Ellis had a "merry-go-round" on his land that was out of repair and dangerous. Small children came upon the land without any business there and in playing about the "merry-go-round" were injured. Is Ellis liable therefor?

§ 223. Is a man who excavates on his own land ever under a duty to guard it against trespassers other than children?

§ 225. Gay sold a stack of hay on his land to Evans and told Evans to come and get it whenever he wanted it. There was a mud hole so deep in the lane on Gay's land that when Evans drove up to get the hay his horse was mired and injured in trying to get out. May Evans recover from Gay for the damage?

§§ 226, 227. A man went into a railroad ticket office to get a time table. The ceiling in the station had become loosened by a recent cyclone, a fact of which the company was not aware, but which it could have found out by a reasonable examination of the building. As the man was leaving the station the ceiling fell and injured him. Is the company responsible?

§ 233. Fair starts a brush fire to clear his land. A sudden un-

expected wind carries the fire to Todd's house which is burned. Is Fair liable for the loss of the house?

§ 234. In such a case would Todd have to prove that Fair was negligent or would Fair have to prove that he was using due care?

§ 236. Luce was driving a flock of sheep along the road. They suddenly bolted and rushed over Ide's land and trampled down his crops. May Ide sue Luce in trespass for the damage?

§ 238. Is it universally true in this country that a man is obliged to keep his own cattle from trespassing on his neighbors?

§ 239. White turned his cattle over to Murphy to keep for him during the winter. While the cattle were in Murphy's possession they escaped and wandered onto Olsen's land. Admitting that by the law of that state White would be responsible if the cattle had been in his possession, would he be responsible under the facts of this case?

§ 240. During a severe storm a stroke of lightning melted the bars on the cage of a lion in a menagerie and he escaped and injured Young. Has the owner of the lion a defense in the fact that the lion escaped without any fault or negligence on the part of the owner?

§ 241. Gray has a bull that so far as he knows has always been good natured. It gores Dale one day wholly without provocation. Is Gray liable?

§ 242. Suppose the facts are the same except that the bull had trespassed on Dale's land and gored Dale's horse, would Gray be liable?

§ 243. Hull had a bulldog that he knew was in the habit of snapping and growling at tramps and trespassers but had never touched people on the street. The dog met Dane on the street and bit him. Is Hull liable?

§§ 244, 245. Luce was a dealer in crude petroleum and erected upon his lands large tanks in which he kept petroleum brought from various districts. An earthquake caused the tanks to split and the petroleum was discharged over neighboring property damaging the same. Is Luce responsible for this damage?

§ 249. Would speaking defamatory remarks about a person into a phonograph and so impressing them on the cylinder be slander or libel?

§ 251. Hill wrote a letter containing defamatory statements about Fox and sent it to Fox's wife who read it and then destroyed it. Is this enough to amount to a publication?

What would be the result if Fox's wife had been a foreigner and did not understand the contents of the letter?

§ 252. Suppose after the letter had been torn up by Fox's wife that the pieces were taken from the waste basket by some inquisitive third person who pasted them together and read and understood the letter, would this be a publication?

§ 254. Why is it that in action for slander it is generally necessary to prove special damage whereas such is not the case in an action for libel?

§ 255. What kinds of defamatory remarks are actionable without proof of special damage?

§ 256. Hill says to Bates of Crane "He is a man of a criminally selfish turn of mind." Is this slanderous?

§ 257. Dale says to Fair in the presence of Ellis, "It is only the fact that the statue of limitations has run that prevents your being in jail for burglary." Is this slanderous?

§ 258. Fales, who was an ardent vegetarian, said to Barnes, who ate meat, "You are as big a murderer as any man who was ever hanged for it." Those present understood that Fales meant that Barnes had no more moral right to take the life of brutes than of human beings. Is the remark actionable?

§ 263. Olsen says of a priest of the Catholic Church, "He talks too much. He tells everything he knows." Are these words alone slanderous?

§ 264. Is it actionable *per se* to say of an attorney, "He practiced law 40 years and never won a case and was finally disbarred?"

§ 265. White says of Jones, "He is one of the few men in the world that has ever been cured of leprosy." Are these words actionable *per se*?

§ 267. Fox said of Mrs. Doane that she was a cheat and a liar. As a result of this Mrs. Doane was excluded from a whist club to which she belonged. The members of her church no longer spoke to her, and her friends refused to receive her at their homes or to accept her invitations to her home. Do any or all of these give her a ground for recovering in an action for slander alleging special damage?

§ 269. Assuming that Mrs. Doane can recover in the above case, would the amount of damages that she could recover be limited by the value of the dinners, etc., that she missed?

§ 270. Abbot, a philanthropist, had a factory in which all the hands were discharged convicts, Abbot hiring them as a means of

giving them a chance to earn a living and get on in the world. Dill, a discharged convict, applied for a place and gave the warden of the prison as a reference. The warden, having a grudge against Dill and wishing to keep him out of the place wrote Abbot that Dill was an absolutely honest man who had never been in prison in his life. As a result Abbot refused to hire Dill. May Dill maintain an action against the warden for slander?

§ 271. Farr accused Miss Brown of having been unchaste and as a consequence her friends refused to speak to her and she was discharged from her position. Farr made the statement maliciously and believing it was false. When sued, however, he discovered that several years before Miss Brown had been unchaste, though she had since reformed. Has Farr a defense?

§ 273. Would Farr in the above case have to prove the truth of his statement or Miss Brown have to prove the falsity of it?

§ 277. Fox says "Ide told me that Cole (a merchant) is on the verge of bankruptcy." Cole is not on the verge of bankruptcy and sues Fox for slander. Is it a defense that Fox only purported to repeat what Ide had told him?

§ 280. A judge being accused by Allen of bribery says in a statement from the bench, "Allen is a rascal who has several times accepted bribes himself and has been in the penitentiary." The statement is knowingly false and uttered maliciously. Is it actionable?

§ 281. A witness was asked by a lawyer on examination. "Would you believe White (the plaintiff) under oath?" The witness answered "No, I wouldn't believe him, or his attorney either, as far as that goes, no matter how solemnly they were sworn to tell the truth." Is the remark as regards White's attorney privileged?

§ 282. A book reviewer says of a certain book supposed to be original, "By actual count over two-thirds of the contents of this work consist of extracts stolen from other works." This is not true in fact. Is it privileged?

§ 284. Dale publishes a book advocating a treaty of alliance between the United States and Japan. A reviewer of the book writes, "The whole scheme back of this is obvious. The railroads and other big corporations in the west want a lot of cheap labor and the author of this work has undertaken to assist them in getting in a horde of Asiatic labor." This was not in fact the case: can the criticism be defended in a libel action on the ground that it is fair comment?

§ 286. What is a criterion of "fair criticism?"

§ 287. A dramatic critic wrote of a theatrical performance: "This

is about the worst specimen of acting that has been seen here for some time. Intending theatre-goers had much better throw their money out of the window and stay comfortably at home." This was not the writer's real opinion and he wrote it only because he was angry at the company because they would not give him passes. If sued for libel, may he defend himself on the ground of fair comment?

§ 289. If the plaintiff sets up the reply that the comment was malicious, must the defendant prove that it was not malicious or the plaintiff prove that it was?

§ 290. Suppose the writer made the foregoing criticism in good faith but his opinion as to the merits of the performance was an entirely unreasonable one, would the criticism be malicious?

§ 294. Suppose a newspaper had published the court proceedings and the statement of the witness given in the question under § 281, would the newspaper be liable in an action for libel?

§ 297. A dozen men met at the house of one of them for the purpose of forming a golf club. A slanderous statement was made there about Payne. The whole proceeding, including this statement, was reported in the town paper. Is the paper liable in an action for libel?

§ 299. Has a newspaper any greater immunity from liability for libel than a private person?

§ 300. Dill learned that Fox, his lawyer, was thinking of taking Gray as a partner and wrote to Fox "I hope you won't take Gray in, you have my business and I shall keep it with you but I don't regard Gray as square and I should be constantly in fear that he would turn traitor." Dill made these statements in good faith, but in fact Gray was a highminded, honorable attorney. Fox refused to take him in as a consequence of this letter and Gray sued Dill for libel. Has Dill a defense?

§ 303. The inhabitants of a town presented a petition to Congress asking their Congressman to move for the impeachment of another Congressman and giving as their reasons therefor, that he had been guilty of several crimes. The statements though made in good faith were false. Are they libellous?

§ 306. A woman discharged her servant. Learning that a stranger in the town was about to hire the servant, she wrote saying that the servant was incompetent, thievish, and untruthful. In fact this was not true though the woman had seen things that made her so believe and she wrote in good faith. Is she liable in an action for libel?

§ 310. Suppose the woman in the last case had put the statement

in the local paper in order to prevent anyone from being deceived by one whom she regarded as a dangerous person: would it make the matter libellous if it could be shown that the paper was read by persons who never hired servants?

§ 312. Finch wrote to his partner in a neighboring city: "John Jones will probably try to borrow some money from you next week. He is a crook of the worst kind." The statement was false. Finch was a busy man and dictated this among other letters to his stenographer. Does that make it non-privileged and so actionable?

§ 313. Suppose the above letter had been written by Finch personally, but he had accidentally put on the wrong address so that it had been delivered to a person having no interest in the matter, would it then become libellous?

§ 314. What are the requisites to maintaining an action for malicious prosecution?

§ 319. Fox had Hill arrested upon a charge of larceny. Before trial he withdrew the charge and Hill was dismissed. Is this a sufficient termination of the criminal action to allow Hill to maintain an action for malicious prosecution?

§ 320. Suppose in the case last mentioned Fox, before having Hill arrested had told the facts to a lawyer and he had advised him that there was enough to hold Hill for larceny, how would this fact be of avail to Fox in an action against him for malicious prosecution?

§ 327. Luce proves that Jones has had him arrested on a criminal charge that has been proved false and that Jones' action was done without probable cause and maliciously. He does not show that he has suffered any special damage as a consequence. Has he made out a case against Jones?

§ 328. White, wishing to embarrass Hoyt in his business and injure his credit, brings an action against him for breach of contract, claiming large damages. The action has no foundation and the judgment is given in Hoyt's favor. May he now bring an action against White for maliciously suing him without cause?

§ 337. Gay is employed by Beach as a travelling salesman. His employment is for a year. Before the year is up, Chase believing that the work is breaking down Gay's health induces him to break his contract. Gay is a particularly good man and Beach is seriously damaged by his leaving his position. Has Beach a right of action against Chase?

§ 339. Fales, wishing to attack Dart, induces a member of Congress in a speech to make certain highly defamatory statements about

Dart, but for which the speaker cannot be held responsible because he is privileged. May Dart recover damages from Fales?

§ 342. Galt was about to buy a typewriter from Fox when Dane, the agent of a rival concern, who wanted to get the sale, wrote Galt that he had better not buy any of Fox's machines because the company making them was being proceeded against for infringement of a patent and if Galt bought the machine, the patentees might sue him also. The statement was wholly false but as a result of it Fox lost the sale. Has Fox's company a right of action against Dane?

§ 344. Suppose in the above case Dane had told Galt that Fox was a tricky individual who had been in jail for cheating and that if he (Galt) didn't take care Fox would cheat him, and that as a consequence of this Fox lost the sale. Could his company sue Dane?

§§ 346, 347. Strikers station pickets in front of the employer's factory and they threaten to beat any one who tries to enter and by that means keep other employees away. May the employer enjoin this?

§ 350. What is the difference in legal principle between the case where the members of a labor union go on a strike and refuse to work unless their employer hires only union labor and the case where they refuse to trade with Gray unless Gray will refuse to sell to the employer against whom they are striking?

§ 351. Lloyd was a travelling salesmn employed by the X. Y. Co. and a very valuable man. He conceived a spite toward one of the bookkeepers of the company and to get revenge on him threatened to leave the company unless it discharged the bookkeeper. Rather than lose Lloyd, the company did so although it had no objection to the bookkeeper. Has the latter a right of action against Lloyd?

§ 355. Abbot, Barnes and Chase are employers. They agree that they will none of them employ laborers who have been discharged from each other's employment. Is such an agreement unlawful?

§ 356. Abbot, Barnes and Chase are employees. They agree that they will none of them work for an employer who has discharged any of them. Is such an agreement unlawful?

APPENDIX B

QUESTIONS — DOMESTIC RELATIONS AND PERSONS

§ 3. Is it necessary that there should be an express promise in order to constitute a contract to marry?

§ 4. John Smith told Mary White that he could not marry her then because his parents opposed but if she would live with him as his wife he would marry her as soon as he could. She did so and he later refused to marry her. May she sue him for breach of promise?

§ 8. Is the fact that the husband or wife is insane on religious questions a ground for annulling the marriage?

§ 11. Will after marrying Lucy, discovered that she was pregnant by another man. May he have the marriage annulled?

Would it make any difference that he had also had intercourse with her before marriage?

§ 12. John Jones abducted Susan Gray and compelled her to go through a marriage ceremony with him. Later she lived with him for 8 weeks as his wife and then brought action to have the marriage annulled on the ground of duress. May she do so?

§ 16. Brown honestly and reasonably believing that his wife was dead, married Jane Smith. His first wife was not dead and after his marriage to Jane Smith brought divorce proceedings on the ground of adultery. Has Brown a defense?

§ 17. The husband brought a woman of immoral character into his house for meals and compelled his wife to associate with her by threatening to beat her if she did not. It is admitted that the wife suffered greatly mentally from the humiliation. May she get a divorce on the ground of cruelty?

§ 18. A husband living with his wife in Boston decided he could do better in a business way in Oklahoma and moved there. The wife refused to go. Is she guilty of desertion?

Suppose the statute required desertion for two years as ground for divorce and at the end of a year she wrote saying that she would come out if he would pay her fare. Could he at the end of another year get a divorce on the ground of desertion?

Suppose at the end of the first year he came back to Boston for a visit and slept with his wife for a week, but aside from that they

had no relation for two years and she steadily refused to go to Oklahoma. Could he get a divorce on grounds of desertion?

§ 20. A husband had to leave his home over night and suspected that his wife was about to commit adultery with Smith. He went nevertheless after hiring a detective to watch the wife. She did commit adultery with Smith. May the husband get a divorce on that ground?

§ 22. The husband sued the wife for divorce on the ground of extreme cruelty and the wife sued the husband on the grounds of desertion. What is the result if both charges are proved?

§ 28. If the husband and wife are domiciled in New York and she deserts him and goes to her parents in Ohio, and he then gets a divorce on the ground of desertion and she then marries Young, in Ohio, and returns with him to New York, may she there be indicted for adultery?

§ 30. What were the common law rights of a husband in his wife's property?

§ 35. In states where, by statute, the husband no longer has a right in the wife's earnings, may the wife sue the husband for the value of her services as housekeeper?

§§ 37, 38. Suppose a married woman borrows $500 from Jones, telling him that she would repay him out of some money that her father was going to give her. What would be the right of Jones in the funds subsequently given by the father, (1) at common law, (2) in equity?

§ 40. What would be his rights under the modern statutes?

§ 44. May a married woman convey her real estate today without her husband joining in the conveyance?

Why is it advisable in any case to get his signature?

§ 54. May a husband and wife do business together as partners?

§ 63. A husband thought that his wife was spending too much time at her mother's, advised her to stop going there and on her refusal locked her in her room. Had he a legal right to do so?

§ 64. Jones was suing Gray for goods sold him, and wanted to put Mrs. Gray on the stand as a witness to testify that Gray had told her that he had received the goods and that they were all right. May she so testify if Gray objects?

§§ 65, 66. A woman in buying her trousseau incurred a debt of $100 which she had not paid when she married. Is her husband responsible for it?

§ 67. A woman leaves her husband because of his cruelty. May she get food and clothing and have them charged to him?

Would this be true if they were living apart by mutual consent?

Would it be true if her father were giving her an allowance?

§ 68. If a husband decides to have his wife pay cash for all that she buys and she uses the money for other purposes and still keeps up her charge accounts, may the merchant so selling hold the husband?

§ 72. Where a statute provides that the wife shall be entitled to her own earnings would the husband have any right of action against a railroad company that negligently injured his wife?

§ 74. Has a married woman a right of action against another woman with whom her husband commits adultery?

§ 77. A husband and wife are divorced and have a male child 6 years old. Both are equally proper persons to have the custody of the child. To which one will it be awarded?

§ 78. A child of divorced parents was given to the father and brought up by him till the father died, and the child was being kept and well brought up by its paternal grandparents who were wealthy. As between them and the mother who is poor, who is entitled to the custody of the child?

§ 79. Suppose in the last case the father and mother had agreed that after the father's death his relatives should have the child but these relatives though wealthy and fond of the child were dissipated and immoral. Could the mother regain custody of the child?

§ 80. What is the general function and scope of the Juvenile Court Acts?

§ 81. A father, who was a widower, went off on a trip and left his child with the housekeeper. Would the latter have a right to inflict corporal punishment on the child if occasion demanded?

§ 83. A father maltreated his child so badly that he left his home and was taken in by a neighbor who called in a doctor to care for the child. Is the father liable for the doctor's charges?

Would the same result follow if the child had been taken away from the father by the mother and afterward fallen ill and been treated by a physician at the request of the mother?

§ 85. James Smith was a boy 17 years old living with his parents and working as errand boy in the afternoon. He bought a bicycle with his earnings. May the father claim the bicycle as his own property?

§ 87. Suppose in the last case that the father had sent the boy to

a neighboring town and told him to earn his own living, could the father then claim the bicycle?

§ 89. A child 10 years old is run down and hurt by a street car so that the parents incur large doctors' and nurses' bills. What is the measure of their total recovery from the street car company?

Suppose the child finally dies as a result of the injury, does this affect the parents' right to recover?

§ 90. Alice Brown, the child of Henry Brown, was seduced while away from home at a boarding school where she was a student. Has Brown a right of action and what is the measure of his recovery?

§ 91. If the child was of age but otherwise the facts were the same could Brown recover damages?

§ 93. A boy of 18, becoming engaged in a dispute with his father knocked him down and severely injured him. May the father bring an action of assault and battery?

§ 94. Charlie Smith, a child 10 years old, took his father's horse and buggy and went for a ride and knocked down and seriously injured Jones. May Jones hold the father responsible?

Suppose the father had given the horse to Charlie to go on an errand for him, would Jones be able to hold the father?

§ 97. A father and mother kept at home and supported an unmarried daughter of 40. She was left a legacy and her parents then sued her for board and lodging since she became of age. May they recover?

§ 97a. Allen left property by will to the children of Dow. Dow has two legitimate children and one illegitimate child. To whom does the property go?

§ 98a. Suppose the third child in the last question had been an adopted child of Dow. Could he have claimed under the will?

§ 101. White was born at 10 P. M., Nov. 4th, 1880. An election took place Nov. 3, 1901, at which all persons resident in the district 21 years of age were qualified voters. White was a resident in the district. Could he vote?

§ 105. Luce, an infant, represented to Fox that he was over 21 and by this means prevailed upon Fox to sell him an automobile. When Fox sued him for the price he set up that he was an infant. Has Fox any redress?

§ 107. An infant bought a suit of clothes for $50. He needed them but they were not worth over $35. How much may the tailor recover in an action?

Would it make any difference if the infant had given his note for $50?

§ 108. Suppose in the above case the parents of the infant would have been perfectly willing to buy him a suit. Would that affect the right of the tailor?

§ 109. A female infant who had to support herself took a series of lessons on the piano. May the value of the lessons be recovered for as necessaries?

§ 113. An infant takes out a life insurance policy, pays two installments and then elects to disaffirm on the ground of infancy. May he get back his premiums or any part thereof?

§ 115. Is there any reason for making a difference between the right of an infant to disaffirm a contract when he is a seller and when he is a buyer?

§ 118. Lord hired Hill, an infant, to work for him at $10 a week. Hill worked six weeks and was paid in full. It was admitted that he was a skillful workman and really worth $12 a week. He did one piece of work negligently, however, which cost Lord $5 to repair. Hill now disaffirms the contract on the ground that he was a minor and sues to recover $72. How much, if anything, should he get?

§ 120. Dale, an infant, goes into partnership with White, Smith and Jones, each putting in $1,000. When the partnership is wound up, after the creditors are paid, there is only $2,500 left. Is Dale entitled to recover his $1,000 in full?

§ 121. Luce, an infant, appointed Bates as his agent to make a contract with Chase. Bates did so on Luce's behalf. Later Luce disaffirmed the contract. May Chase hold Bates in Luce's place?

§ 123. Fox, an infant, bought an auto from Gray, paying cash therefor. Three days later he sold the auto to Hall and with the cash from that sale bought bonds. He then disaffirmed, as he may, the purchase of the auto from Gray and recovered from him the price for it. What are Gray's rights?

§ 129. Suppose in the last case that the infant had kept the auto after he became of age and used it for three months, could he then have disaffirmed and recovered the price paid for it?

§ 129. Yoe, an infant, borrows $1,000 from Luce and after he comes of age for 2 years neither affirms nor disaffirms the contract. At the end of that time may he disaffirm it?

§ 130. An infant sells land to Dale, this being a transaction which the infant may disaffirm and revest title in himself. In the interval

has Dale a sufficient title to bring ejectment against a third person who ejects him from the land?

§ 131. Has an infant legal capacity to act as an assistant in a county recorder's office?

Has he legal capacity to act as judge?

§ 134. An infant buys an auto, this being a contract that he may disaffirm, and by false representations induces the dealer to give him credit. May he so disaffirm the contract as to bar an action for false pretences?

§ 134. An infant hires a horse and drives him so hard that the horse dies. Has the stable keeper any redress against the infant?